United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,667

United States Court of Appeals
For the
District of Columbia Circuit
FILED NOV 19 1958
Joseph W. Stewart
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ROYAL INDEMNITY CO.,
To Its Own Use And To The Use Of
FRED A. DOWELL,

Appellant,

v.

MALONEY CONCRETE COMPANY,

Appellee.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

1. Whether the lower Court was justified in directing a verdict for the Appellee considering the facts elicited by the appellants, together with all reasonable inferences to be deduced therefrom, considered in a light most favorable to the appellant.

2. Whether the issues of negligence and contributory negligence were questions for the jury in an action against a truck owner for personal injuries sustained by an employee on a construction project, who was struck from behind and knocked down by a backing cement-mixer truck which had been standing still for a considerable period of time while under the observation of the injured employee, and which backing movement of the truck did not begin until the injured employee had passed beyond it and was partially behind the truck, and where no warning was given by the truck driver of his intended move and where the sound of the truck motor was unnoticed because of the rumbling of the cement mixer, and where an inadequate lookout was maintained by and for the driver in an area where there was a likelihood of working men being in the path of the vehicle.

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UNITED STATES COURT OF APPEALS

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ROYAL INDEMNITY CO.,
To Its Own Use And To The Use Of
FRED A. DOWELL,

Appellant,

v.

MALONEY CONCRETE COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Title 28, Section 1291 of the United States Code to review the action of the United States District Court for the District of Columbia in this proceeding. The Court below granted an oral motion made by the appellee to direct a verdict. Thereafter, the Court denied a timely Motion for a New Trial made by plaintiffs, appellants herein. This appeal is from the granting of the motion for the directed verdict and from the denial of the motion for a new trial.

STATEMENT OF THE CASE

The appellant herein is the Royal Indemnity Company, a body corporate, to its own use and to the use of Fred A. Dowell, an individual. At all times pertinent hereto, Royal Indemnity Company was the workmen's compensation insurance carrier for the B. Frank Joy Company, Mr. Dowell's employer. Having paid medical expenses incurred by Mr. Dowell, and having paid compensation benefits to him, for injuries sustained within the course of his employment, the carrier became subrogated to Dowell's interests to the extent of its payments and is thus a party in interest pursuant to the Longshoremen's and Harbor Worker's Compensation Act. (44 Stat. 1424; 33 U.S.C. 901 et seq., as amended) as made applicable to the District of Columbia by the Act of May 17, 1928. (45 Stat. 600; 36 D.C. Code 501, 502).

The appellee, Maloney Concrete Company, is a corporation engaged in the concrete construction business and the owner of the concrete-mixer truck that was here involved.

On September 16, 1954, Dowell, employed as an air compressor operator, was working on a project involving street repair on Sheridan Street, N.W., near the intersection of Fifth Street, in the District of Columbia. In the course of his employment he was caused to walk from the location of the air compressor machine that he operated to another part of the same project (App. 25, 26, 29). In so doing, appellant walked at a normal pace for a distance of some 60 yards toward the front of the concrete-mixer truck owned by appellee (App. 28). The truck was stopped, the driver was sitting behind the wheel and the mixer drum was turning (App. 26, 27, 28, 29, 37). On approaching the truck appellant noticed a rear-view mirror on the truck's right side (App. 29, 42, 43, 44). He took several steps beyond the rear of the truck and "angled" to his right, thus placing his right foot and approximately one half of his body behind the truck (App. 27, 29, 30, 31, 40, 41). As he did so appellant Dowell heard a warning cry from someone who was apparently directing the truck back on the left rear side. (App. 27, 29, 30, 31). Before he

could move to his left or turn around, appellant was struck in the middle of his back by the right-rear projection of the truck and propelled on a 45 degree angle to his left. His right foot was then caught by a lug on the right-rear tire of the truck, causing a compound fracture to both the tibia and fibula bones in the leg. (App. 27, 29, 30, 31, 36)

At the conclusion of appellants' testimony, and that of the investigating police officer, the Court below called upon counsel for the defense to "take up his motion for a directed verdict and assume the medical testimony is already in" (App. 47). After brief argument, the Court directed the verdict, apparently on the grounds that the evidence indicated that the individual appellant was contributorily negligent as a matter of law, and further that no lack of care was shown on the part of the driver of the truck in backing the truck. (App. 47-50)

Thereafter, a Motion for a New Trial was duly filed and denied without hearing or oral argument, and without formal findings of fact and conclusions of law. This appeal followed.

STATEMENT OF POINTS

The points upon which appellant intends to rely on this appeal are as follows:

1. The Court erred in concluding at the close of the appellants' testimony that appellant, Fred A. Dowell, was guilty of contributory negligence as a matter of law and that such contributory negligence was the sole proximate cause of his injuries.
2. The Court erred in directing a verdict for the appellee at the close of the appellants' case on the issue of liability in that:
   (a) The granting of a Motion for a Directed Verdict at that stage was contrary to the evidence.
   (b) The granting of a Motion for a Directed Verdict at that stage was contrary to the law.

3. The Court erred in denying appellants' Motion for New Trial.

SUMMARY OF ARGUMENT

The testimony of the individual appellant, Dowell, raised factual questions of whether the appellee was negligent and whether the appellant, Dowell, was contributorily negligent in that reasonable men might honestly differ as to whether, under the circumstances presented, the appellee and the appellant exercised proper care.

The facts here were subject to conclusions and inferences, which, if determined favorably for the appellants by the jury under proper instructions, could reasonably have resulted in a finding for the appellants and, conversely, the facts and inferences presented were not such as to warrant a conclusion that the appellee was not negligent and the appellant was contributorily negligent as a matter of law.

While the doctrines of "res ipsa loquitor" and "last clear chance" are not urged as being particularly applicable by such designations, the facts indicating that the appellant as a pedestrian was struck by a backing cement mixer, a potentially dangerous instrumentality under the exclusive control of the appellee, which had started to move toward the appellant after he had passed beyond it and beyond his range of observation, he thus being in a position of peril of which he had no notice, to the extent that such doctrines shift the burden of going forward, create presumptions, and constitute expressions of proximate cause, they support appellant's position that the evidence established that the sole and proximate cause of appellant's injuries was the negligence of appellee's truck driver.

ARGUMENT

The question presented by this appeal is primarily whether the case was properly taken from the jury.

> "A motion to direct a verdict admits every fact in evidence that tends to sustain appellants' case, together with every inference reasonably deductible therefrom; and if there was any evidence from which the jury could reasonably have found for appellant, upon proper instructions of law, the order directing the verdict was improper".

Galt vs. Phoenix Indemnity Company, 120 F. 2d 723; Hellweg vs. Chesapeake and Potomac Telephone Company, 71 App. D. C. 346, 110 F. 2d 546; Jackson vs. Capital Transit Company, 69 App. D. C. 187, 99 F. 2d 380.

The evidence adduced by the appellant must be construed most favorably to the appellant and he is entitled to every legitimate inference therefrom, and if, on the evidence so considered, reasonable men might differ, the case should go to the jury. Shewmaker vs. Capital Transit Company, 79 U. S. App. D. C. 102, 143 F. 2d 142; Higaski vs. Shifflett, 90 U. S. App. D. C. 302, 195 F. 2d 784; Willoughby vs. Safeway Stores, Inc., 91 U. S. App. D. C. 168, 198 F. 2d 604; Goodwin vs. Hertzberg, 91 U. S. App. D. C. 385, 201 F. 2d 204.

Issues of negligence and contributory negligence are universally recognized as being issues of fact and it is only when reasonable men could not honestly draw different conclusions as to the existence of the negligence charged that the question becomes one of "law". Tobin vs. Pennsylvania Railroad Company, 69 App. D. C. 262, 100 F. 2d 435, cert. denied 59 S. Ct. 488, 306 U. S. 640, 83 L. Ed. 1040; Boaze vs. Windridge and Handy, 70 App. D. C. 24, 102 F. 2d 628; McWilliams vs. Shepard, 75 U. S. App. D. C. 339, 127 F. 2d 18.

The action of the Court below in directing a verdict for the appellee poses the question as to whether the facts elicited by the appellant, together with all the reasonable inferences that could be deduced therefrom, considered in a light most favorably to the appellant, presented a question of fact as to negligence and contributory negligence. The question is also posed as to whether on the facts introduced by the appellant together with the legitimate inferences to be drawn therefrom, reasonable men might honestly draw different conclusions regarding the liability of the appellee for negligence, or the existence of contributory negligence on the part of the individual appellant.

The facts in the instant case are neither particularly complex nor involved. Appellant, Dowell, as a pedestrian, was struck by a backing truck. The evidence regarding the happening of the event was almost exclusively in the form of testimony by Dowell. A police officer, who investigated the matter and who arrived at the scene sometime after the occurrence, established measurements relevant to the scene such as width of the street, distance from the intersection, etc., but his testimony was limited because of his lack of direct knowledge. (App. 20-24). Neither the appellee's truck driver nor his helper, who was directing the truck's backward movement according to appellee's opening statement, was called to testify by the appellants, and accordingly the individual appellant's, Dowell's, version of the incident was uncontradicted and unimpeached.

Dowell's testimony was essentially as follows: On September 16, 1954, he was employed by the B. Frank Joy Company as an air compressor operator and he arrived at a project near the intersection of Fifth and Sheridan Streets, N.W., Washington, D.C., at approximately 9:00 A.M. (App. 25). After completing an assignment some distance west of Fifth Street on Sheridan Street, N.W., (App. 25, 26), he walked, from the location of his compressor approximately 60 yards, (App. 28), in an easterly direction toward Fifth Street; He saw a cement-mixer truck that was parked on Sheridan Street about 50 or 60 yards west of Fifth

Street, facing west, with the right side of the truck about 10 or 12 feet south of the north curb of Sheridan Street and the left side, or driver's side, about even with the center of Sheridan Street, (App. 26, 27, 28); Traffic at the time was confined to the normally eastbound lane of Sheridan Street (App. 31, 34); As he approached the truck from the front, walking in about the center of the north half of the street, he observed the driver seated in the driver's seat and the truck standing still with the cement-mixer drum turning, (App. 27, 28, 29, 37); He was walking at a normal pace and he noted that a rear-view mirror approximately 18 inches long by 4 inches wide extended out the right side of the truck on an 18-inch arm, (App. 29, 42, 43, 44); He walked along the right side of the truck, approximately arm's length distance from the truck itself (App. 29); As he reached and walked past the rear of the truck, it remained stationary, (App. 29, 30, 40, 41); then someone yelled, Dowell partially turned and the catwalk of the truck struck his back, (App. 27, 29, 30, 31); He was propelled to his left, forward, at a 45 degree angle, and his right heel was caught by the right-rear tire of the truck causing him immediately to fall to the street, (App. 29, 31); There was a cut approximately 10 feet square in the street about 10 or 12 feet,(App. 31, 35), behind the truck and Dowell intended to communicate with a man standing behind the cut, on the left side facing the truck. (App. 28, 31, 35, 37, 38). The warning he heard and the blow to his back were almost simultaneous in that he had no time to turn either way. (App. 36).

On cross-examination, Dowell testified in response to questions by defense counsel that the truck driver could have seen him as he traversed the length of the truck and turned to his right several steps behind the truck through the right-hand, rear-view mirror on the truck if it had been properly adjusted. (App. 38, 46). He further reiterated that the truck was standing still as he walked beyond the right-rear corner (App. 40, 41).

It is submitted that on the basis of the foregoing facts, the jury could properly have found that the appellee's driver was negligent in starting to back his vehicle without taking reasonable steps, including the maintaining of a proper lookout, to make fairly certain that such a maneuver could be made with safety. "Backing without taking the necessary precautions is negligence", 5A Am.Jur., Automobiles, Section 328. It is clear from the appellee's opening statement and appellants' testimony regarding the position of the man who called the warning, that only the left, or driver's side of the truck was being protected. It is reasonable to assume that the only purpose of the guide on the left was to assist the driver insofar as the length of the back-up was concerned and not at all related to safety of pedestrians. If the truck driver had seen appellant, his backing of the truck demonstrated a complete disregard for appellant's safety. If the truck driver did not see appellant, his backing of the truck without checking his right side constituted negligence. Where, as here, the truck driver was stopped on a public street, albeit partially under construction, he owed a duty not only to the general public but to other workmen on the job to maintain a proper lookout. He was not relieved of that duty because he had a job to do or because he had a guide to assist him in completing a potentially dangerous maneuver.

In this case, the truck driver not only was negligent in backing a heavy truck without first determining if it could be done with safety, but he was also negligent in starting the truck from a stopped position with a pedestrian in dangerous proximity thereto. In the case of Taulburg vs. Andresen, 119 Neb. 273, 228 N. W. 528, it was held that "One precaution that must be taken before starting to back is that of looking to see that the way is clear. The driver must continue to look while he is in the act of backing". If we were to assume that no testimony or evidence was to be introduced by appellee, the absence of an explanation would certainly afford a basis for branding the striking of appellant as a departure from the standard of reasonable care. The same considerations

apply with equal, if not greater, force insofar as the propriety of directing the verdict in this case is concerned.

Similarly, the conduct of the truck driver in failing to see or warn appellant until an instant before the impact, and in withholding his backing movement until appellant had passed beyond the extreme rear of the truck had the obvious effect here of enticing the appellant to turn to his right behind the truck, and thus such action on the part of appellant could not properly be determined to constitute a proximate cause of the occurrence. Furthermore, there is no evidence of a warning having been given in the form of a signal or sounding of a horn, until after the backing movement had begun. A motorist must give a timely warning of an intention to back, 5A Am. Jur., Automobiles, Section 339. The blind backing of a truck along a street with no provision to warn persons in its path and with no requirement that the driver shall be on the lookout does not constitute reasonable care, Clark vs. Gilmore, 213 Miss. 590, 57 So. 2d 328.

If we assume that the helper standing to the left rear of the truck was stationed there to direct the backward movement of the truck, in addition to assist in limiting the distance of the back-up, he was certainly not in a proper position to make reasonably certain that such movement could be made in safety since the entire right side of the vehicle was unobserved by him. If the driver was observing only the helper and the left side of the truck, he was negligent in that he failed to do that which could reasonably be expected of him. If the helper either was not in a proper position to prevent an incident of the type that occurred, or if he did not see appellant when the evidence discloses he could and should have seen him, then too he was negligent. It could hardly be asserted that the driver was relieved of his duty to exercise reasonable care because he had a helper, nor could it be successfully maintained that the appellee would not be liable for the negligence of that assistant.

The appellee in its opening statement, and the lower Court in its direction of the verdict, maintained that there was no negligence on the part of the truck driver because the truck was there for the purpose of backing up and discharging its contents in the excavation. The proposition that a party is not negligent where he is performing an intended function is clearly without merit and cannot be considered as a correct statement of the law. It is submitted that the performance of any function, much less the backing of a ponderous cement mixer, must be done with the exercise of reasonable care.

In any event, the questions of whether the truck driver and the helper exercised reasonable care under the circumstances outlined by the appellant are matters upon which reasonable men might differ, and they thus constituted questions of fact for submission to the jury under proper instructions. On the question of negligence or contributory negligence, when the facts or inferences to be drawn from them are doubtful, or where reasonable men might differ as to their effect or characterization, the whole matter must be submitted to the jury under proper instructions, District of Columbia vs. Moulton, 21 S. Ct. 840, 182 U. S. 576, 45 L. Ed. 1237.

The Court below held that appellant was contributorily negligent as a matter of law because of the "quickness" of his turn. It is submitted first that there was no evidence before the Court upon which such a finding could be based. Appellant at all times testified that he "angled" to his right, or "veered slightly" to his right, and the Court's characterization of the turn was unfounded in fact. In any event, the connotations, "quick", "slight", etc., demonstrate the factual problem here involved and present a question of fact.

Furthermore, appellant had made at least 2 steps beyond the rear of the truck, and possibly 4, at the time he was struck, and then he was struck in the middle of the back by the right-rear projection of the truck. At presented, the turn of appellant could not conceivably be

characterized as "quick". At the time he passed the right rear of the truck it was standing still and had been standing still as he approached from a distance of 50 to 60 yards. Could not he assume that the driver saw him as he approached and walked along the right side and started his turn? Could he not assume that the truck was standing there only to mix its load of concrete? Could he not assume that he would be warned of any sudden movement on the part of the truck? As he walked along the right side of the truck and passed its rear, could he not assume that the driver knew there were only three possible movements he could make -- to continue straight ahead, to turn to his left, or to turn to his right? Would he be negligent as a matter of law if he made such assumptions?

It is submitted that such considerations again demonstrate the factual and relative nature of the questions presented.

The Court below was in error in holding that there were no factual issues on which reasonable men could differ. The very fact that the truck involved in the accident was in the process of backing up at the time of the occurrence should lead a judge to consider the facts most carefully in directing a verdict for the appellee on the ground that the appellant had not proven negligence on the appellee's part. The backing of an automobile, much less a huge cement-mixer truck, is a perilous operation calling for the driver's full attention. This Court has characterized such a maneuver in meaningful language in Eades vs. Capital Materials Company, 121 F.2d 72 (Ct. App. D. C., 1941): "Driving, particularly backing, an automobile is fraught with danger." (emphasis supplied). In the Eades case, plaintiff's decedent, a workman, had been run over by a backing cement truck. At the close of plaintiff's evidence on the issue of negligence the Court directed a verdict for the defendant. This Court of Appeals reversed on the ground that the issues of negligence and contributory negligence should have been presented to the jury. Important considerations among others which guided the Court in arriving at its decision were: (1) the driver's visibility was

much less than normal, (2) the task was difficult, (3) there was a lot of noise, and (4) there were workmen in the area. These identical considerations were present in the instant case. The driver of the cement truck did not have a good view of the right side and right back of the truck, in fact there is no evidence that his mirror on the right side was properly adjusted so that he could have seen anyone toward the right rear of the truck. The backing of a cement truck cannot be classed as anything other than a difficult task, a fact pointed up by the presence of another workman standing at the left rear of the truck supposedly to aid in guiding it back. There was a great deal of noise present here as the big cement drum was turning prior to and at the time of the incident. And finally not only was it a fact that there were many workmen in the area of the accident but also the record shows that the plaintiff approached the truck in full view of the driver from a distance of 50 to 60 yards.

The Eades decision is squarely in point, but even without this precedent it is clear that, under the circumstances presented by appellant's evidence, the issues of negligence and of contributory negligence, if subsequently raised by appellee, should have been presented to the jury.

It is further submitted that the appellant was entitled to the following inferences that can logically and legitimately be drawn from the record of his testimony.

1. The area where the accident occurred being partially under construction, it was known to the appellee's driver that other workmen were likely to be in or near the vicinity.

2. That appellee's driver either saw, or should have seen, the appellant Dowell approach from the front on a path directed to place him in the proximity of the truck.

3. That appellee's driver either saw, or should have seen, appellant walking along the right side of the truck toward the rear.

4. That appellee's driver either saw the appellant Dowell angle toward the rear of the truck placing himself partially behind the truck, or he should have, in the exercise of due care, seen him, or that, in any event, the appellee's driver should have anticipated such a turn by the appellant.

5. That appellant Dowell, having seen the truck standing for the period of time it was under his observation, could in the exercise of due care anticipate it would continue to remain stationary.

6. That the noise of the turning drum was sufficient to prevent appellant from hearing the truck approach him from the rear and, on the other hand, that appellee's driver knew that such noise would prevent the appellant Dowell from so hearing.

7. That the instrumentality that caused the injury was under the exclusive control of the appellee, and if not carefully operated, was likely to do harm.

8. That the striking of a pedestrian by a backing truck is, in itself, negligence, especially in the absence of an explanation by appellee's driver.

9. That even conceding arguendo that appellant Dowell was contributorily negligent in stepping partially behind a standing truck, the last negligent act that occurred in point of time was the starting of the truck without making certain that it would be done with safety and was thus the efficient and proximate cause of the appellant's injuries.

CONCLUSION

It is therefore respectfully submitted that the facts, fairly presented, constituted a jury question; that the Court below erred in directing a verdict for the appellee and in denying a motion for a new trial; and that the judgment should be reversed and the cause remanded for a new trial.

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APPELLANT'S APPENDIX

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93 [Filed April 6, 1956]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRED A. DOWELL 317 Ethan Allen Avenue Takoma Park, Maryland and ROYAL INDEMNITY COMPANY a body corporate 1405 G Street, N. W. Washington, D. C. Plaintiffs, vs. MALONEY CONCRETE COMPANY a body corporate 3112 K Street, N. W. Washington, D. C. Defendant.	)	Civil Action No. 1448-56

COMPLAINT

(Subrogation)

1. Jurisdiction is vested in this Court by virtue of Title 11, Section 301, et seq., District of Columbia Code. The amount in controversy is in excess of $3,000.00, exclusive of interest and costs.

2. The plaintiff, Royal Indemnity Company, is a corporation doing business in the District of Columbia. At all times material hereto it was the workmen's compensation insurance carrier for B. Frank Joy Co., Inc.

3. The plaintiff, Fred A. Dowell, at the time of the accident complained of, was an employee of the said B. Frank Joy Co., Inc., acting in the course of his employment.

4. The defendant, Maloney Concrete Company, is a body corporate doing business in the District of Columbia.

5. On or about September 16, 1954, near 5th and Sheridan Streets, N. W., in the District of Columbia, the defendant corporation owned a concrete mixer truck which was operated in a careless and negli-
94 gent manner at said time and place in that it was backed into and over the plaintiff Fred A. Dowell who was then and there a pedestrian.

6. As a result of the negligence and carelessness of the defendant, the plaintiff, Fred A. Dowell, received serious, painful and permanent injuries to his person including a severe compound fracture of the right tibia and fibula requiring extensive hospitalization and the introduction of an intra medullary nail in the right leg. These injuries have caused the plaintiff to suffer and will in the future cause him to suffer pain of mind and body. He has been required to submit to certain surgical procedures for the repair of said right leg and he will in the future be required to be hospitalized and to undergo further surgical procedures and medical treatment. He has been and he will in the future be totally incapacitated from performing the duties of his employment with a consequent loss of income and he has been and he will in the future be prevented from engaging in his usual activities and social pursu its.

7. The plaintiff, Royal Indemnity Company, has been required and will in the future be required, pursuant to the provisions of Section 7(a) of the Longshoremen and Harbor Workers' Act, 33 U. S. C. A. Section 907(a), to pay the cost of the surgery and the medical and hospital care furnished Fred A. Dowell and has, in addition, been required and will in the future be required, pursuant to the provisions of said act, 33 U. S. C. A. Section 901, et seq., to pay to the plaintiff compensation for total disability and said plaintiff has therefor, become subrogated to the rights of the said Jessie J. Schafer to prosecute this action to the extent of these payments.

As of March 6, 1956, Royal Indemnity Company had paid to Fred A. Dowell, $2, 555. 00 in compensation for 73 weeks of total disability,
95 and as of said date Royal Indemnity Company had paid out $818. 00 in medical expenses.

WHEREFORE, the plaintiffs, Royal Indemnity Company and Fred A. Dowell, demand judgment against the defendant Maloney Concrete Company for damages in the sum of $250,000.00 besides the cost of this action.

MACLEAY, LYNCH and MACDONALD

By /s/ Hugh Lynch, Jr.

/s/ C. E. Channing, Jr.
Attorneys for Plaintiffs
1625 K Street, N. W.
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Plaintiffs herein demand jury trial of all issues.

/s/ Hugh Lynch, Jr.

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96 [Filed June 21, 1956]

ANSWER TO COMPLAINT

Comes now the defendant Maloney Concrete Company, a body corporate, and for answer to the complaint filed herein, states as follows:

FIRST DEFENSE:

The plaintiffs are not entitled to recover against the defendant in the matters set forth in the complaint, for the reason that they have failed to state a cause of action therein upon which recovery can be had against the defendant.

SECOND DEFENSE:

Defendant admits the allegations of Paragraph One (1); neither admits nor denies the allegations of Paragraph Two (2), because of insufficient information so to do and, therefore, denies such paragraph and demands strict proof thereof; admits the allegations of Paragraphs Three (3) and Four (4); denies the allegations of Paragraphs Five (5), Six (6) and Seven (7) of the complaint.

97 THIRD DEFENSE:

For further defense to the complaint and each paragraph, this defendant avers that at the time and place referred to in the complaint, plaintiff Fred A. Dowell was an employee of B. Frank Joy Co., Inc.,

acting in the course of his employment and any injuries complained of which came to him were without any fault, neglect or failure of any kind on the part of this defendant, its agents, servants and/or employees, but grew out of and were in the course of said Dowell's employment and any compensation which he is entitled thereto is pursuant to the provisions of Section 7(a) of the Longshoremen and Harbor Workers' Act, 33 U.S.C.A. Section 907(a), which remedy is exclusive with respect to said alleged injuries.

FOURTH DEFENSE:

For further defense to the complaint and each paragraph thereof, this defendant avers that at the time and place in question, its motor vehicle was being operated in a careful, prudent and proper manner and it was being placed in position for the emptying of concrete under the guidance of persons there in charge of the work, who had purchased said concrete from this defendant and were directing and advising and supervising this defendant in placing its vehicle in proper position to deliver said concrete where the purchaser thereof desired and directed it be placed; at which time, plaintiff, in the course of his duties, did negligently fail to exercise reasonable care for his own safety; and any injuries which came to him are not such to entitle him to compensation against this defendant, but are:

(a). The result of his employment and caused to be incurred in the course thereof and covered exclusively by the Longshoremen and Harbor Workers' Act;

(b). The result of his own negligence and inattention to his own safety and condition;

98 (c). The result of the negligence of the general contractor at the job site and/or his employees and representatives and without any fault, failure or neglect on the part of this defendant, its agents, servants and/or employees.

WELCH, DAILY & WELCH

By: /s/ J. Harry Welch
Attorneys for defendant

[Certificate of Service]

100 [Filed April 3, 1957]

AMENDED COMPLAINT

1. Jurisdiction is vested in this Court by virtue of Title II, Section 301, et seq., District of Columbia Code. The amount in controversy is in excess of $3,000.00, exclusive of interest and costs.

2. The plaintiff, Royal Indemnity Company, is a corporation doing business in the District of Columbia. At all times material hereto it was the workmen's compensation insurance carrier for B. Frank Joy Co., Inc.

3. The use plaintiff, Fred A. Dowell, at the time of the accident complained of, was an employee of the said B. Frank Joy Co., Inc., acting in the course of his employment.

4. The defendant, Maloney Concrete Company, is a body corporate doing business in the District of Columbia.

5. On or about September 16, 1954, near Fifth and Sheridan Streets, N.W., in the District of Columbia, the defendant corporation owned a concrete mixer truck which was operated in a careless and negligent manner at said time and place in that it was backed into and over the use plaintiff, Fred A. Dowell, who was then and there a pedestrian.

6. As a result of the negligence and carelessnes of the defendant, the use plaintiff, Fred A. Dowell, received serious, painful and permanent injuries to his person including a severe compound fracture of the right

101 tibia and fibula requiring extensive hospitalization and the introduction of an intra medullary nail in the right leg. These injuries have caused the use plaintiff to suffer and will in the future cause him to suffer pain of mind and body. He has been required to submit to certain surgical procedures for the repair of said right leg and he will in the future be required to be hospitalized and to undergo further surgical procedures and medical treatment. He has been and he will in the future be totally incapacitated from performing the duties of his employment with a consequent loss of income and he has been and he will in the future be prevented from engaging in his usual activities and social pursuits.

7. The plaintiff, Royal Indemnity Company, has been required and will in the future be required, pursuant to the provisions of Section 7(a) of the Longshoremen and Harbor Workers' Act, 33 U. S. C. A. Section 907(a), to pay the cost of the surgery and the medical and hospital care furnished Fred A. Dowell and has, in addition, been required, pursuant to an award issued by the Deputy Commissioner District of Columbia Compensation District, a copy of which is attached hereto as Exhibit A and made a part hereof, to pay to the use plaintiff compensation for temporary total disability and for permanent partial disability in the amount of $3,000.00. As of March 15, 1957, plaintiff, Royal Indemnity Company, has paid out for the benefit of the use plaintiff, Fred A. Dowell, the sum of $1,224.60 in medical expenses.

8. By reason of the award by the Deputy Commissioner as aforesaid and pursuant to the provisions of the Longshoremen and Harbor Workers' Act, 33 U. S. C. A. Section 901, et seq., the plaintiff, Royal Indemnity Company, became entitled to bring this action to its own use to the extent of its payments for compensation and medical expenses and to the use of the use plaintiff, Fred A. Dowell to the full extent of his damages.

102 WHEREFORE, the plaintiffs, Royal Indemnity Company and Fred A. Dowell, demand judgment against the defendant, Maloney Concrete Company, for damages in the sum of $250,000.00, besides the cost of this action.

MACLEAY, LYNCH & MACDONALD

By /s/ Hugh Lynch, Jr.

/s/ C. E. Channing, Jr.

Attorneys for Plaintiffs

* * * *

Plaintiffs herein demand jury trial of all issues.

104 [Filed January 30, 1958]

PRETRIAL STATEMENT OF PLAINTIFFS

Statement of Facts

Plaintiffs herein are Royal Indemnity Company and Fred A. Dowell, workmen's compensation insurance carrier for B. Frank Joy Company, Inc., and claimant employee thereof, respectively.

Defendant is a corporation engaged in the concrete construction company and owner of a concrete mixer truck that was involved herein.

On September 16, 1954, plaintiff, Dowell, was employed by the B. Frank Joy Company as an air compressor operator on a job near Fifth and Sheridan Street, N. W. In the course of his employment, he was struck and knocked down by a truck owned by the defendant and operated in a careless and negligent manner by its employee, one Thomas Hawkins.

Injuries

As a result, Mr. Dowell sustained an oblique fracture of the bones of the lower right leg, both the tibia and fibula. He was totally disabled from September 17, 1954 to January 22, 1956 inclusive, a period of 70 3/7 weeks and still suffers degree of disability consisting of a limitation of motion of the leg, atrophy of the muscles, and the need to wear a partial leg brace coupled with the presence of an osteoporosis condition.

Specials Claimed

By virtue of an award entered in Compensation Order Case No. 337-247, dated March 15, 1957, the plaintiff insurance carrier paid to the

105 individual plaintiff and claims by way of subrogation the following:

For temporary total disability, 70 3/7 weeks at $35.00 per week	$2,465.00
For permanent partial disability 17.3 weeks at $35.00 per week	605.50
	$3,070.50
For medical expenses	
Drs. Groover, Christie and Merritt	32.00
Emergency Hospital	676.00
Dr. Sanford Eisenberg	40.00
R & G Orthopedic Appliances	45.00
Dr. Julius Nevaiser	25.00
Farragut Clinic	406.00
	$1,224.60

Furthermore, on February 21, 1956, the leg was reinjured and as a result, the carrier incurred the following expenses:

For temporary total disability 11 weeks and 5 days	410.00
For medical expenses	
Farragut Clinic	80.00
Dr. Gantz	13.00
	$ 503.00

Recapitulation of workmen's compensation benefits:

For compensation payments	3,070.50
For medical expenses	1,224.60
For additional compensation	410.00
For additional medical expenses	93.00
	$4,798.10

Plaintiff insurance carrier claims the aforegoing amount by way of subrogation.

The individual plaintiff's claim consists of the following:

For loss of wages	$2,542.00
82 weeks at $31.00 per week ($31.00 per week being the difference between his average weekly earnings of $66.00 per week and the compensation benefits)	
For pain and suffering	

106 Stipulations Requested

1. Medical and hospital bills to be admitted without formal proof subject to the usual objection.

2. The Compensation Award entered in case No. 337-247, dated March 15, 1957.

MACLEAY, LYNCH & MACDONALD

By /s/ James C. Gregg
* * * * * * *
Attorneys for Plaintiffs

[Certificate of Service]

107 [Filed January 30, 1958]

DEFENDANT'S PRETRIAL STATEMENT

Defendant, Maloney Concrete Company, a corporation, for pretrial statement, asserts as follows:

The answer filed to the original complaint is prayed to be read as an answer to the amended complaint in all respects.

Defendant demands strict proof that plaintiff at the time of the accident was an employee in such a status that he has a right to sue this defendant, it being the position of the defendant that this case is covered entirely by the Longshoremen's & Harbor Worker's Act and that the remedies provided therein which have been availed of by the individual plaintiff, who personally did not sue the defendant, are exclusive remedies and bar any recovery so far as he is concerned.

With respect to the right of Royal Indemnity Company to recover, defendant asserts that the injuries sustained by individual plaintiff grew out of and were in the course of his employment, and that no other right of action accrued therefrom, except that provided under the Longshoremen's and Harbor Worker's Act, and, therefore, Royal Indemnity Company has no right of recovery here.

Defendant asserts the matters set forth in its Fourth Defense to the complaint as part of this pretrial statement; said defenses being listed as Paragraphs (a), (b), and (c).

WELCH, DAILY & WELCH

BY: /s/ J. Harry Welch
Attorneys for defendant

108 [Certificate of Service]

This pretrial is set for January 30, 1958 at 10:00 A. M.

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103 [Filed January 30, 1958]

PRETRIAL PROCEEDINGS

STATEMENT OF NATURE OF CASE:

This is a so-called use action brought in the name of the carrier to the use of the injured party. The plaintiff's pretrial statement sufficiently

elaborates on the claim and the specific financial items involved are set forth individually.

The defendant's pretrial statement is likewise definitely sufficient.

No possibility of settlement.

All documentary evidence relevant and throwing light on the controversy it is agreed between the parties may be offered without formal proof.

The defendant is granted permission within five days from date hereof to examine the file of the Commission relating to this matter, Commission Case No. 337-247.

Of course the names of all witnesses are to be exchanged.

/s/ Matthew F. McGuire
Pretrial Judge

/s/ James C. Gregg
Attorney for Plaintiff

/s/ J. Joseph Barse
Attorney for Defendant

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

[Filed August 26, 1958]

1 Civil Action No. 1448-56

Washington, D. C.

The above-entitled matter came on for hearing before HONORABLE JOHN D. MARTIN, Sr., a United States Circuit Judge, sitting by designation, at 11:45 A.M.

APPEARANCES:

For the Plaintiff:

James C. Gregg, Esquire

For the Defendant:

Harry Welch, Esquire

* * * *

3 (Following the selection of a jury the following proceedings were had in open Court:)

AFTERNOON SESSION:

MR. GREGG: May it please the Court and ladies and gentlemen of the jury, as previously indicated to you, the action before you now is a suit for personal injuries sustained by Mr. Dowell. The plaintiffs in the case are the Royal Indemnity Company, to its own use, and the use of Mr. Dowell. The reason the case is captioned as so is for this reason: At the time of the accident, Mr. Dowell was employed by the B. Frank Joy Company, Incorporated, and these injuries were sustained while in the scope of his employment. The Royal Indemnity Company was the workmen's compensation insurance carrier for his employer, the B. Frank Joy Company. As a result of this injury the insurance carrier paid to Mr. Dowell certain sums of money, pursuant to the

Workmen's Compensation Law in the District of Columbia. In addition, they paid for all the medical and hospital bills that were incurred as a result of this injury, pursuant to the Workmen's Compensation Act in the District of Columbia. As a result, the insurance company in this action proceeds on the theory the plaintiff's injuries were caused by the negligence of the Maloney Concrete Company, through one of its employees in the operation of the truck, and now claiming compensation pursuant to the Workmen's Compensation Act against the Maloney

4 Concrete Company. Mr. Dowell, in this action, is claiming the difference between his earnings prior to the injury and what he received as compensation checks, which as you know, are always in normal cases, below a man's earnings.

In addition, to filing an award for loss of income, Mr. Dowell is also claiming an award in dollars in an amount as you shall deem proper for his pain and suffering resulting from this accident. We will prove that on September 16, 1954, Mr. Dowell was employed by the B. Frank Joy Company, Inc., as an air compressor operator. In the course of his employment he was called to go from the scene of his air compressor to another part where the work was taking place, and in doing so, he walked along the street, passed the truck, and a concrete mixer owned by the Maloney Concrete Company, which was standing still, the motor off. He walked along the street behind the truck until he reached the point, approximately even with the rear of the truck, when he angled across the back of the truck to go to where his employer was. We will prove that just as he stepped off behind the truck, the truck was suddenly put in motion by the operator, who failed to see Mr. Dowell as he walked along the side toward the rear. And, as a result, the truck came back and struck Mr. Dowell in the small of the back, and caught his heel in the lugs of the wheel, severely fracturing both bones in the right leg--the tibia and fibula. We will prove that

5 Mr. Dowell sustained what is known as an oblique fracture in the lower bone of his right leg. The fracture, we will prove, was a severe fracture, a compound fracture, the bones coming through the skin, they

were the tibia and fibula. We will prove that he was totally disabled from the date of the accident, September 16, 1954, until January 22, 1956, a period of 70 3/7 weeks, and he still suffers a degree of limitation in the right leg. He suffers from what is known as atrophy of the muscles, which is a weakening or a wasting away of the muscles. He, at times, will have to wear a brace, a metal brace, in order to strengthen the leg.

After going back to work on January 22, 1956, Mr. Dowell was employed on his usual job, which involved considerable maneuvering and walking around. He was involved in another accident. He had this metal brace over his heel and in stepping up on to a curb, the brace gave way and he fell, further injuring the leg that had been previously injured, which had not completely healed. As a result of that accident, he was unemployed again for a period of eleven weeks and five days.

We will prove that immediately after the accident, the ambulance came to the scene in which Mr. Dowell's leg was fractured, with the bone in the lower part of the leg sticking out through the skin about half-way up across the leg. He was taken to a hospital and given a sedation; the fracture was reduced and the leg was placed in a cast. He was in Emergency Hospital for approximately 30 days during which
6 time he had a heavy cast on the upper part of his leg, completely immobilized all the way down to the heel. The cast was then replaced with a walking cast and he wore the walking cast for approximately a month. The leg brace I referred to was worn by Mr. Dowell practically exclusively for about a year. In accordance with the Workmen's Compensation Act in the District, the insurance company paid Mr. Dowell the statutory compensation benefits for the 70 3/7 weeks that he was unemployed at the rate of $35.00 a week, a sum of $2465.00. Furthermore, when he went back to work he was awarded by the Workmen's Compensation Commission of the District a 10 per cent permanent partial disability of the leg for which the company paid him $605.50. Therefore, the company paid $3070.50 for compensation

benefits and medical expenses. For medical expenses, we will prove the insurance company paid the sum of $1224.00 for doctor's treatments, hospital bills, doctor's examinations; orthopedic appliances, and so forth. As a result of the re-injury of the leg, the Company paid him $410.00 for compensation benefits. For medical expenses, they paid an additional $93.00, making an additional $503.00 that the insurance company paid to or on his account. The total for compensation and medical expenses is thus $4798.10. The insurance company claims that amount by way of subrogation against the Maloney Concrete Company.

7 The individual claim, Mr. Dowell's claim, is the loss of wages, which is the difference between $35.00 a week he received in compensation benefits and the $66.00 a week that he was averaging prior to the accident. The difference is thus $31.00 a week for the period of time involved, totaling $2542.00. Those are the actual expenses that the plaintiff is claiming. In addition to that, in accordance with the instructions that the court will give at the close of the evidence, the plaintiff is also claiming an amount so as to cover pain and suffering involved in the injury that he incurred. Therefore, during the course of this trial, we will produce testimony in detail which we expect to prove at the time of this accident this truck, the Maloney Concrete truck, was being operated in a careless and negligent manner, and in so doing, it struck and collided with Mr. Dowell causing the injuries. We shall, therefore, ask you, in the consideration of all the evidence, to award a verdict to Mr. Dowell, and the insurance company in the amount of their expenses, and Mr. Dowell in the amount of his expenses whatever the evidence to the amount of the fracture is, warranted by the testimony, to be awarded to him to compensate him for the pain and suffering he sustained. Thank you.

MR. WELCH: May we approach the bench?

THE COURT: Yes, sir.

8 (AT THE BENCH:)

MR. WELCH: Your Honor, Mr. Gregg remarked in that opening

statement as to what they intended to prove. I tried to write it down as best I could, I can't write shorthand, but I think what he intended to prove is that the individual by reason of his employment incurred the injury in question, in the course of his employment. Plaintiff called to the attention of the court, that as he walked alongside the truck, but actually he angled to the rear of the truck. This here is improper and the circumstances are that the driver of the truck started to back and he said he backed in a negligent manner causing the accident and the resultant injuries. He has not said what the negligent circumstances are nor what occurred in a negligent way. As a matter of fact there is no such thing. Plaintiff at this time started giving us negligence without knowing what negligence he is claiming. There is no negligence in starting or backing a truck because somebody is in and about his work nor has he given us any indication of what he is giving to the Court.

THE COURT: Do you want to supplement your statement?

MR. GREGG: Yes.

THE COURT: Just a minute, I think you should be more specific in stating what your negligence is.

(FOLLOWING BENCH CONFERENCE:)

9 MR. GREGG: Ladies and Gentlemen of the Jury: In further amplification of my opening statement, I wish to add the following: It is the plaintiff's position, of course, that the injury and the accident complained of was caused by the negligence of the operator of the Maloney Concrete Truck. The accident occurred, as indicated, on September 16, 1954. At that time, Mr. Dowell was employed by the B. Frank Joy Company. He was an air compressor operator. At that time he was working on a construction job at the intersection of 5th Street and Sheridan Street, N.W., in the District of Columbia. On this particular occasion, we will prove that Mr. Dowell had just arrived at the scene of this accident approximately a half-hour before the accident occurred. He went to the scene where the air compressors were located. It was approximately half-way between the block on Sheridan Street between 5th and 6th Streets in Washington. He arrived at the

scene and performed the particular function that he was called to do at that time. After completing that particular job, he started to walk from the location of the air compressors toward 5th Street. At the time this accident occurred, the northern half of Sheridan Street was under construction; there was a barricade up on or near 5th Street, keeping traffic entirely in the southern half of Sheridan Street, and on that particular portion of the street, traffic was moving in both directions on one-half of the street; and as he completed his chore, he saw Maloney Concrete truck stopped approximately 60 yards from
10 the intersection of 5th Street. He walked up the center of the street. The truck was parked facing the direction in which he was walking and the motor was running. The drum was turning. The operator was seated on the left-hand side of the truck. The truck was standing still as he walked towards it, and the left-hand side of the truck was approximately even with the center line of Sheridan Street. As he approached the scene, nothing was taking place except the drum was turning on the cement mixer. As he walked up to the truck, he walked up along the right hand side. The reason he didn't go on the left was that traffic was moving in both directions at that time and he couldn't. He walked along the right-hand side toward the rear. As he approached he could see the driver sitting in the driver's seat. The truck was standing still. He walked along the right hand side of the truck. The truck was standing still at all times, with the drum turning and the motor was making considerable noise. As he reached the rear of the truck, the truck was still standing still. He walked across to go over on an angle, and as he did so he heard somebody yell, a third party, who was apparently directing the truck. Just as that person yelled, he turned his head, but too late, as the truck caught him in the small of the back, pushing him over, and the wheel caught his leg breaking his leg severely, as previously indicated. We contend such an accident on the part of the driver . . .

11 MR. WELCH: I do not think he should argue the conclusion.

THE COURT: No, just a statement of what you want to make

specific. State what you say was negligence on the part of the driver.

MR. GREGG: Under the circumstances, the truck was started in a careless and negligent manner without regard to Mr. Dowell, who was on the premises in a legal and lawful way. He was one of the many men who were working on the project. There were others in the neighborhood. It is our position that before starting their truck, under those circumstances, with Mr. Dowell either there to be seen, or, actually having been seen, was negligent. It is our position that the driver of that truck saw Mr. Dowell, or should have seen Mr. Dowell. In any event, Mr. Dowell walked past the rear of the truck at the time it was standing still, with no indication that the truck was going to start back, and then it started back suddenly, and without warning, and struck him as indicated.

MR. WELCH: May we approach the bench?

THE COURT: Yes, sir.

(BENCH CONFERENCE NOT RECORDED)

MR. WELCH: We, of course, are moving on the theory that the plaintiff failed to state a cause of negligence against this defendant. They have stated this was a construction job with men, material, and equipment thereabouts; that he saw our truck standing there with the cement mixer motor running; the motor of the truck also was running.

12 We have that testimony to elicit. That he went by the truck on the truck's right side, that is, the side opposite to the driver; that he saw the driver. He then went to the rear of the truck where he knew he was out of the sight of the driver. There were other employees there in and about the work, the plaintiff then, after he had gotten to the rear of the truck, instead of proceeding straight on out of range of the truck if it moved, he angled directly behind it, and the driver started the truck and someone hollered and it was too late for him to get out of the way. It is perfectly obvious from the statement that the driver couldn't see him; didn't know where he went when he went back there, and nothing to indicate he had gone behind the truck when he went by it on the right side, or that he was at all near the rear of the truck.

And at the conclusion of my opening statement I shall ask for a directed verdict for the defendant.

THE COURT: It is peculiar to ask a Circuit Judge to direct a verdict at the conclusion of an opening statement. I will over rule that.

MR. WELCH: May it please the Court and members of the jury, on behalf of the defendant, Maloney Concrete, we expect to show that at the time and place in question, the truck came to the scene of the work, which was being done, for the purpose of delivering and unloading materials which had been purchased from the defendant, Maloney, by A.
13 Smith Company, who were the general contractors on this particular construction job. That the individual plaintiff, Mr. Dowell, was working for a firm named Joy. That his own work had to do with operating a steam compressor. You have seen these machines that break up concrete in that way. That was the type of work that he was engaged in at that time. He was not working for Maloney; he was not working for Smith, the general contractor, but he was working for Joy, the sub-contractor, so that his employer and Maloney were in a sense, in a similar job; both were doing work for the general contractor. We expect to show that the truck waited for another truck to pull out and then the truck got into position where it could be unloading according to the directions to be given it by Smith to whom it was taking the material. That when the truck was in its position to get where it could unload this concrete--you may have seen some of these machines--it has a drum that revolves; it is run by a motor and when you unload there is a big pipe or two that comes down from it, and they unload either into a hole, or a vehicle, and that carries the concrete where you want it. That when he got nearly in position, then he was directed, as he had been on several other occasions on this same job and on other jobs on the part of Smith Company, who purchased this concrete. When he got into position he was approximately in the center of the road--half of the road. The testimony will show, half of the road was open to
14 traffic carrying both north and south traffic. The other half they were working on and no traffic was allowed at all, it being a

general working area where the subcontractors and employees were in and about the work. That, as he got there he was on the left side of the truck, and in order to back he had to look out the left side of the truck to see how he was being directed into position. There were two men from the Smith Company assisting him to get into position. One had the contraption that comes from the truck--the tube or pipe where you unload the material. The other stood back and waved and motioned to him to come on to direct him to get in position most convenient to the truck for the unloading. That he at no time saw this Mr. Dowell because he had come up on the other side of his truck and he had gone beyond any bounds where he could see him from the cab--from that part of the truck. That he was motioned to come back into position by this man working for A. Smith Company, in order that they might properly unload. That he was in and about that duty when this man came up and saw that this truck was about to unload. He was familiar with the job, familiar with those trucks going back and forth, and knew that they came there and were there for the purpose of delivering and unloading concrete. That as the truck driver was motioned to come back, he was looking out of the left side of the truck so he could follow their directions properly and he was moving at about three or four
15 miles an hour; as he backed he had moved only a short distance when they hollered to him to stop. He stopped immediately, not knowing what they wanted him to stop for, whether there was something back there, whether he had gone far enough, or what--it being necessary to depend on their directions in order to get into position. At no time did he see this man near the truck; at no time could he see the man near the truck, but Mr. Dowell, seeing what was taking place, walked up to the back of the truck and--if this were the truck which was backing in this direction with a driver there looking out on this side and he knowing he couldn't see the driver or the driver see him--deliberately walked right into the path of the truck. We submit that if we show you these things, we will have shown you that he contributed by his negligence to the accident and that the manner in which the truck was being

unloaded or backed in for unloading was without fault or negligence on the part of the Maloney Concrete Company. We also expect to show you that he, being an employee of the B. Frank Joy Company at the time that this accident happened, in the course of and growing out of his employment, to be a strict compensation case and that is why the Royal Indemnity Company paid him thirty-two or thirty-three dollars--paid him $3070.00 plus $1224.00 medical. That is why they paid it to him, because under the Longshoreman's Act which is the act of compensation for the people in the District for this type of employment--

16 the Longshoreman's and Harbor Workers Act, compensation act for the District of Columbia, and it is, we submit we will show you an exclusive remedy if the accident happened in the course of and growing out of his employment, and there was no negligence on the part of the defendant, and we expect to show you there was no negligence on the part of Maloney, the third party here, but it was in the course of and growing out of his employment, and as a result of his own negligence. If we show you these things at the proper time we will expect a verdict at your hands for the defendant.

* * * *

17 NELSON R. MARSH

was called as a witness by the plaintiff and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

18 BY MR. GREGG:

Q. Will you state your name, please? A. Policeman Nelson R. Marsh.

Q. Where are you assigned? A. Assigned to the Accident Investigation Unit, Metropolitan Police Department.

Q. Directing your attention to September 16, 1954, were you so assigned on that date? A. I was.

Q. Did there come a time during the course of that day when you received a call to go near the intersection of 5th and Sheridan Streets? A. I received a radio call from the police dispatcher to

respond to an accident in the 500 block of Sheridan Street.

Q. Pursuant to that call did you go to the scene? A. I did.

Q. When you arrived, what did you find? A. I found a truck that had been involved in a collision with a pedestrian at the scene.

* * * *

19 Q. How did you get to the scene, officer? A. By scout car.

Q. Were you by yourself? A. No, sir.

Q. You had someone with you, another officer? A. Yes, sir.

Q. What was his name? A. Officer Manger.

Q. When you arrived at the scene, what did you see? A. A truck--a 1953 GMC--mixer truck, DC tag Ca - 27.

Q. What type of truck was that? A. A GMC mixer truck. It is a concrete truck mixer.

Q. Was there any name on the truck? A. Maloney Concrete on the side of the truck.

Q. Where was the truck when you arrived at the scene? A. The truck was in front of 515 Sheridan Street, N. W.

Q. Will you step over to the blackboard? Before you go over, Officer, after you arrived at the scene do you remember or learn whether or not the truck had been moved after the accident occurred?

20 A. I don't remember if the truck had been moved after the time the accident happened until we arrived.

Q. When you arrived at the scene, what was the truck doing? A. It was still sitting in the street.

Q. Was the motor running? A. I do not recall.

Q. Was the concrete drum turning? A. I do not recall.

Q. Would you step over to the blackboard? During the course of your investigation did you make any measurements at the scene? A. I measured all four sections this accident is supposed to have happened--from 5th Street here from this curb, and the width of the street.

Q. What did you find was the width of the street? A. The width of Sherman Avenue was 31 feet wide.

Q. Is that Sherman Avenue or Sheridan Street? A. Sheridan

Avenue.

Q. How many feet wide? A. 31.

Q. How far from the intersection of 5th Street was it? A. 190 feet from this intersection right here where this accident is supposed to have happened.

Q. Was there anything between 5th Street and the truck on the
21 roadway, or on the street itself, when you arrived at the scene? A. They were working on the roadway. I do not remember what was in between there. I know they were working on the roadway.

Q. When you arrived, where was the truck sitting with regard to the curbs of Sheridan Street? A. 11 feet from this curb to where the rear of the truck was.

Q. Will you mark on the board the width of the street and also, 11 feet is measured from where to where? A. North curb south into Sheridan Street.

Q. The 11 feet, where was that measurement? A. That was where the pedestrian was involved with the truck.

MR. WELCH: I object to the classification of pedestrian, if your Honor please.

THE COURT: I couldn't hear the answer.

THE WITNESS: That was where the pedestrian was involved with the truck, or the truck was involved with the pedestrian.

THE COURT: You didn't see that?

THE WITNESS: No.

THE COURT: That would be purely hearsay and will be excluded.

BY MR. GREGG:

22 Q. In which direction was the truck facing when you arrived at the scene? A. The truck was facing west.

Q. That is the direction in which you are pointing? A. Yes, sir.

Q. The 11 feet was measured from the north curb of Sheridan Street is that right? A. That is right.

Q. Did you determine the name of the driver of the truck?

A. Yes, sir. Thomas J. Hawkins.

Q. Did you discuss this matter with him? A. Yes, sir, I did.

* * * *

23 Q. You got there 10 or 12 minutes after the accident? A. Yes, sir.

Q. When you arrived on the scene was a party named Mr. Dowell present? A. I do not recall if he was still on the scene or not, sir.

Q. Did you obtain the names of any witnesses to the occurrence? A. Yes, sir.

24 Q. What were they? A. Mr. Jackson and Mr. Thomas.

MR. GREGG: I have no further questions of this witness.

MR. WELCH: I have none, Your Honor.

MR. GREGG: May he be excused?

THE COURT: You might preserve his testimony here if you want to, pending a final ruling.

(OUTSIDE HEARING OF THE JURY, THE FOLLOWING EXAMINATION TOOK PLACE:)

THE COURT: You wouldn't object if I put my ruling on this by reading to the plaintiff? You can cross-examine him on this, too.

MR. WELCH: What are you going to read to the plaintiff?

THE COURT: Not anything until I have made my ruling.

MR. WELCH: I am not sure I understand what you are going to rule on.

THE COURT: What I am going to do is take this man's testimony of what he just testified to outside the hearing of the plaintiff.

MR. WELCH: I understand that.

THE COURT: Then you can cross-examine without prejudice in any way.

MR. WELCH: Yes, sir.

25 BY MR. GREGG:

Q. Who was identified as the driver of the Maloney Concrete truck? A. Mr. Hawkins.

Q. Did you interrogate him at all after the accident happened?

A. Yes, sir. I interrogated him at the scene of the accident.

Q. What did he say? A. He stated he was backing east on Sheridan Street approximately 3 to 5 miles an hour. Those men in back of the truck, Mr. Jackson and Mr. Thomas called to him to come on back and he was in collision with the pedestrian.

Q. And what was the name of the pedestrian? A. Mr. Dowell.

CROSS-EXAMINATION

BY MR. WELCH:

Q. Did you inquire as to whether he had seen the party with whom he had an accident--Dowell--before the collision? A. I probably asked him.

Q. Not what you probably did. What did your records show?

THE JUDGE: What does your memory recall?

MR. WELCH: He has testified from the record.

26 THE COURT: The record wouldn't be admissible. It is the witness's statement.

MR. GREGG: The witness didn't see the pedestrian--the operator.

THE COURT: I think from the report--you might examine the report he shows there, too.

BY MR. WELCH:

Q. Thank you, your Honor. Does your report show a sort of response that one of the witnesses were Jackson or Thomas were directing the driver of the truck to back to a position for unloading?
A. One or both are here.

Q. One or both of them told you that? A. Yes, sir.

Q. And that collaborated all the driver told you? A. Yes, sir.

THE COURT: Thank you, Officer.

MR. GREGG: May this witness be excused, if the Court please?

THE COURT: That is why he was doing this at the intersection, was to keep law and order in the District, so I will let the Captain go.

FRED A. DOWELL

was called as a witness by the plaintiff and, having been first duly

sworn, was examined and testified as follows:

DIRECT EXAMINATION

27 [BY MR. GREGG:]

Q. State your name, please. A. Fred A. Dowell.

Q. Speak loudly so the entire jury can hear you. What is your address? A. 317 Ethan Allen Avenue, Takoma Park, Maryland.

Q. Could you speak a little louder? A. 317 Ethan Allen Avenue, Takoma Park, Maryland.

Q. What is your occupation, Mr. Dowell? A. Equipment operator for B. Frank Joy.

Q. Directing your attention to the month of September 1954 how were you employed at that time? A. I was employed as an air compressor operator for the B. Frank Joy Company, hired out to A. H. Smith Construction Company.

Q. As an air compressor operator, what were your duties at that time, generally? A. My duties were to operate this machine.

Q. What did that entail? A. Well, starting and stopping, and driving.

Q. Did there come a time during the month of September 1954, when you were employed on a job near the intersection of 5th and Sheridan Streets N.W.? A. Yes, sir.

Q. Do you recall what date it was? A. September 16th.

Q. 1954? A. 1954.

28 Q. On that date, about what time did you arrive at the scene? A. I arrived there near 9 o'clock. School was taking in at the time.

Q. What did you do? A. I had two men with me on the machine, and they tamped a concrete cut in the street, so I moved down to the next opening and tamped that one.

Q. Where was that with relation to the intersection of 5th and Sheridan Streets? A. It was down in that direction toward Georgia Avenue.

Q. On what street? A. Sheridan Street.

Q. On what side of Sheridan Street? A. On the north side.

Q. How far down the street was it where you were working?
A. It was approximately 55 or 60 yards.

Q. From where? A. From 5th Street.

Q. You say you worked on a job tamping further down the street toward 6th Street, is that right? A. That is where my compressor was at the time.

Q. And when you moved further up the street toward 5th Street?
29 A. No, I just walked up there.

Q. You completed the job you were working on? A. That is right.

Q. Where the compressor was. A. I didn't know where else to go.

Q. Did you turn off the compressor or whatever machinery you had there at that time? A. Yes, and walked up to find out where they wanted me to go next.

Q. Walked up in what direction? A. Toward 5th Street.

Q. Where were you walking? A. I was walking along the north side of the street between the sidewalk and this truck that was parked there.

Q. How close to the sidewalk, or how close to the curb toward the truck were you? A. I will say it was just about 10 or 12 feet--a little more than the width of a car.

THE COURT: I don't quite follow this. He dropped his voice. Will you locate the truck again?

THE WITNESS: The truck was about 50 or 60 yards down Sheridan from 5th Street.

THE COURT: It was about how far from 5th Street? Will you take a pointer over there and point to it?
30 A. I would say the truck was about here.

THE COURT: How far from the south curb of Sheridan Street was that--the end of the truck nearest the curb. How far was it?

THE WITNESS: From 5th Street, Your Honor?

THE COURT: Well, the accident happened on Sheridan Street,

didn't it?

THE WITNESS: Yes--about here.

THE COURT: How many feet would that be?

THE WITNESS: I don't exactly know. It would possibly be about 180 or 190 feet from here to here.

THE COURT: You mean 180 or 190 feet from the intersection from 5th Street and I can't recall at present how far over on the street it was on the north side.

THE WITNESS: It was on the north side and it just had room enough for traffic to go both ways here.

THE COURT: Which way was the truck facing when you first saw it?

THE WITNESS: It was facing in this direction down Sheridan Street.

THE COURT: All right. Could you draw just a block for the truck on the graph there about where you think it was. You haven't got a scale measure.

THE WITNESS: It was about near this.

THE COURT: Did you notice cars while walking?

31 THE WITNESS: Many cars came up here beside the truck this way.

THE COURT: That is the rear end of the truck?

THE WITNESS: This is the rear end, yes.

THE COURT: Was the driver sitting in the driver's seat?

THE WITNESS: Yes, sir.

THE COURT: Did you see any sign of recognition from him?

THE WITNESS: No, sir, I didn't pay too much attention to him. He was sitting in the cab.

THE COURT: Naturally you walked on. Just make little dotted lines showing that.

THE WITNESS: I walked in front and slightly over here, and when I got just behind the truck there was a yell and before I could turn all the way around this truck had struck me--the catwalk of the

truck.

THE COURT: You indicated that you made a little turn in behind the rear of the truck.

THE WITNESS: I was supposed to see a man over here who was in this section, so I veered across, and the drum was running.

THE COURT: You say you were supposed to see a man over there--who was he?

THE WITNESS: He was the third man, or men, in charge of this job. I was going to ask where he wanted me to work next.

32 THE COURT: He was your superior on that job?

THE WITNESS: That is right. He was the superior on that job.

THE COURT: Show with dotted lines where you were and headed to if you hadn't been stopped.

THE WITNESS: I was headed over here.

THE COURT: All right.

BY MR. GREGG:

Q. How far in front of the truck--how much distance separated the front of the truck and the job, or the place where you had previously been working that morning? A. I would say about the same distance this truck was from 5th Street.

Q. In other words, approximately 60 yards in front of the truck? A. Down at the bottom of a little incline.

Q. As you approached the truck did you continue to walk in a straight line approximately the way you continued there? A. Yes, when I was approaching the truck I kept straight on out here.

Q. As you approached the truck what was the truck doing? A. It was standing still in that position.

Q. In other words, it was there when you first saw it--when you approached it. A. That is right.

Q. It stayed there? A. It stayed there.

33 Q. As you approached it, could you see the driver? A. I could see him, yes.

Q. Where was he? A. He was sitting in the cab.

Q. Was there anyone else in the cab with him? A. No, sir.

Q. Was the truck moving at all? A. It wasn't moving at all.

Q. Was there any part of the truck that was moving? A. Except for the drum running in back.

Q. Does that involve any noise? A. Quite a bit, sir.

Q. How far was your progress along your path toward the truck--how far distance--where you still saw the driver? A. Oh, I could see him until I got about here.

Q. Then you couldn't see him any longer. A. I couldn't see him any more.

Q. In what direction were you looking as you walked alongside the truck? A. I was looking to the rear of the truck.

Q. How close to the truck were you? A. I was approximately 2 feet--about 2 feet. I could possibly have reached it with my hand.

Q. As you reached the rear of the truck what was the truck doing? A. It was still standing still.

Q. You continued to walk? A. I continued to walk. I veered over here slightly.

Q. Then what happened? A. This guy yelled.

Q. Who yelled? A. Somebody yelled. I don't know who it was it happened so quickly, and when he yelled I partially turned and then this cat-walk struck my shoulder and I went forward and then the wheel caught me on the left heel.

Q. You went forward under your own motion? A. No, the truck pushed me. That was the first indication I had the truck was coming when it pushed me on the back.

Q. Put an arrow in the direction in which you were going when the truck hit you so I can tell the direction in which your body was propelled. A. Yes, sir, over in this direction here and I landed about here.

Q. Just after it struck you what happened as the truck struck you in the back? A. I only stepped forward with my left foot.

Q. You stepped forward with your left foot? A. When I went

to turn, I stepped this way and when the truck hit me I went out--my left foot near this, and then the tire caught my heel. It all happened so fast I slipped and fell in the street.

35 Q. As you got to the rear of the truck could you see anybody? A. Yes, I could see a man on the chute, and there was a man standing here.

Q. What was the man on the chute doing? A. He was holding the chute.

Q. Was he standing still? A. He was standing still.

Q. What was the other man doing when you got to the rear of the truck? A. He was standing still, here.

Q. You did hear a yell? A. I heard somebody yell.

Q. And what did they yell? A. They just yelled "Look out!."

Q. Do you know who it was who yelled? A. No, I do not know exactly who it was. I just heard this sudden yell to look out and then the truck hit me here in the back.

Q. Would you describe the type of truck that was involved? A. That was a large truck. I think it holds about 6 yards of concrete. It has 8 wheels on the back and 2 wheels on the front.

Q. Was there any equipment on the truck such as a chute in the rear? A. Yes, there was a chute protruding out from the rear.

36 Q. Was there any name on the truck that you were aware of? A. Yes, sir.

Q. What was that name? A. Maloney.

Q. Maloney Concrete Company? A. Just Maloney, sir.

Q. How long had you been working on the job in this vicinity--in this area? A. On this one job?

Q. Yes. A. I had been there approximately 30 minutes.

Q. And was that the first time you had been in this area? A. That was the first time I had been on that job, yes, sir.

Q. Was there anything being done on the street? A. Yes, they were cutting and repairing the street.

Q. Was there anything beside the truck? A. Yes, there was

this cut opening in the street.

Q. How far from the truck was that opening in the street? A. I will say approximately 10 or 12 feet.

Q. Was there anything else in the street on that side of the street? A. Nothing but the barricade between 5th Street and the cut.

Q. Where was the traffic moving, if it were moving, on Sheri-
37 dan Street? A. Well, it was moving both ways. It was at the time of morning that it was busy and quite a bit of traffic there moving on the left side of the truck, both ways.

Q. Traffic was moving on the south side of Sheridan Street in both directions? A. That is right. There was just room enough for them to pass.

THE COURT: Tell me, please, you said there was a man standing back of the truck somewhere, close to it?

THE WITNESS: Yes, sir.

THE COURT: Mark an "X" on there where the man you wanted to see was standing. How far were those two men apart?

THE WITNESS: Those two men I will say were 10 or 12 feet apart. The chute is about 6 feet long and he was standing back there beside the cut which was possibly about 10 feet.

MR. GREGG: Does that answer your question?

THE COURT: Go ahead.

BY MR. GREGG:

Q. If the truck struck you in the small of the back and you pitched forward in this direction you say you landed on the ground? A. I landed on the concrete.

Q. Then what happened? A. I started to get up. I didn't know I was injured and I started to get up and I seen my leg was flopped over.
38 Q. Will you describe it? A. My foot was laying there.

Q. Were you lying on your back at that time? A. On my back.

Q. And you say your knee was straight up? A. That is right.

Q. And which way was your foot? A. My foot was lying over the knee.

Q. Then what did you do? A. I couldn't do anything. I just laid back down.

Q. And subsequently did an ambulance arrive? A. Yes.

* * * *

44 THE COURT: Do you mind my asking him a question?

MR. GREGG: No, indeed.

THE COURT: Mr. Dowell, in your own way, I would like for you to demonstrate just your actions--it is right important. Assume that the lady there on the back row is in the driver's seat of the truck, and assume that this is the side of the truck and that that is the end of the truck--I do not know about the dimensions--but you can walk along about the same distance that you walked from the truck, and then make the sort of turn down at the end--meaning the end of the jury box--the end of the truck. Just make the sort of turn and walk about the same pace that you took.

THE WITNESS: I will make the opposite turn.

THE COURT: So . . .

MR. GREGG: Your Honor, that would be turning the opposite direction.

THE COURT: So if we assume what I am assuming would he . . .

45 MR. GREGG: Yes, his turn was to his right.

THE WITNESS: My turn was to my right.

THE COURT: Well, come up this way, and start down at the other end and come up this way if that is the case, and make your turn up here just as you did at the rear of the truck. That is the front of the truck down there now.

THE WITNESS: Yes.

THE COURT: And the driver, I take it, was on the left hand side?

THE WITNESS: Yes.

THE COURT: Come along as you did--step back just a little bit farther--come along about what you think was the distance that you traveled from the front of the truck, and the pace at which you came

and the way that you made the turn. That will be more graphic than words.

THE WITNESS: I was walking about this distance from the truck and I got about to this part of the truck and I made a slight turn to the right.

THE COURT: You haven't done what I asked you to do. I asked you to make your turn like you made it. You were talking and you stopped. Try that again, and without talking. You just come as you did and make the sort of turn you made about the same time if you will--you were about there when you were struck?

THE WITNESS: Possibly a little bit further.

46 THE COURT: O.K.

* * * *

47 [BY MR. GREGG:]

Q. Didn't there come a time after you returned to work when you had another accident? A. Yes, I slipped on the curb.

Q. Will you describe what happened? A. I got out of the truck

48 and I had this steel brace on.

Q. Will you describe the brace? A. It is two heavy steel pieces going up from the heel and it hinges on each side about the ankle and there is a leather-legging about that long, felt-lined, that laced up my leg like a boot.

Q. And you were wearing it when you returned to work? A. I was wearing that; I was required to wear it.

Q. Tell us what happened on this occasion? A. You mean the second accident?

Q. Yes. A. He drove the truck up and parked it, and I went to step out of the truck and I put my foot on the curb--I thought it was all the way on the curb. This brace gives a sort of a false sense of security because it is stiff. When I applied my feet, my toe went down and I went backward, and the heel appeared to slip off the curb, so all the weight went down on that leg. I was stepping out of the truck down on the curb.

Q. And you put your foot down and your foot was on the curb? A. My heel was on the curb. I thought my foot was on the curb.

Q. You thought your entire foot was on the curb? A. Yes, and the toe tipped down and it tipped me backward and I tried to catch
49 but I couldn't catch anything.

Q. What did you experience on that occasion? A. Quite a bit of pain and quite a bit of swelling. The doctor was a little worried because I have a steel-pin in the bone from the ankle to the knee and he was worried that possibly I had broken that pin.

* * * *

MR. GREGG: I have no further questions.

CROSS-EXAMINATION

BY MR. WELCH:

* * * *

50 Q. What is the nature of your work did you say: running a steam compressor? A. Air compressor.

Q. Did you just run the motor end of it or did you run these things that dig up the place? A. No, I just operated the machine itself.

Q. In other words, you were just furnishing the juice for the other men doing the tamping and breaking? A. That is right.

Q. What was the condition of the street? They were working on Sheridan Street, weren't they? A. Yes, sir.

Q. And what was the condition of the street when you got there to work, with regard to traffic? Was traffic only permitted on the south side of the street? A. Yes, sir.

51 Q. And traffic went both east and west on the south side of the street? A. That is right.

Q. Along the center where they were working from the center to the north, were there any barricades to keep the traffic over here on the south side of the street? A. There were, but right against the truck.

Q. Can you come down and draw how it was barricaded, and how far down it went if it did go down? A. As well as I can remember

there was a barricade there and this was the cut, the opening, in the concrete and there was a barricade here, naturally, and there was one here, and there was one very near the truck and this traffic was squeezing by here.

Q. Then these barricades extend down the street beyond where you had been working? A. No, sir. There wasn't any along here, and then where I was working there were four men surrounding that opening in the street.

Q. Was the traffic which was moving west bound to go over to the north side of the street? A. No, sir, the whole side of the street was closed.

Q. While you are here, this cut that you speak of, it was on the north side of Sheridan Street. Is that where they had poured up the cement or put down any surface? A. That is right.

52 Q. How big was that cut you refer to? A. I don't know exactly. It was about 10 feet square.

Q. And the truck was directly in front of that but a few feet--how far down? A. About 10 or 12 feet down.

Q. That is the rear of the truck? A. Yes.

Q. This gentleman which you said you saw standing here--was he the man that you were looking for--going to see yourself? A. No, sir, the man was not here, but this man was the man that directed the truck driver. The man I went to see wasn't there, but I was looking for him.

Q. Did you see this man directing the truck? A. No, sir.

Q. How do you know he was doing that? A. I am just surmising that he was. I do not exactly know. I think he was the man that I wanted.

Q. When you came around the side of the truck and cut into your right--if you want to sit down again you may--(Witness resumed his seat on the witness stand)--where was the man with the chute--was he directly behind the middle of the truck? A. No, sir, he wasn't directly. I think the chute was sort of turned slightly to the left.

53 Q. That would be toward the side away from you? A. Yes, sir.

Q. Did he have it extended out from the truck? A. Yes, sir.

Q. So that how far behind the truck was he? A. Well, he was possibly 6 or 7 feet, which was the end of the chute.

Q. And that would leave the end of the chute 4 feet or more from the cut? A. He was probably 4 to 6 feet--I don't know exactly.

Q. Well, from the rear distance? A. Yes, sir.

Q. Then it wouldn't be where they could drive the concrete into the cut down that chute? A. No.

Q. And you could see it? A. Oh, I think there was quite a bit of space from where it emptied where the hole was.

Q. The other man was standing over a further distance away near the left side of the truck, but back some 10 or 12 feet? A. Yes, sir, near the chute.

Q. Did you see that man make any gesture of any kind? A. Well, no, sir.

Q. Was he standing with his hands up or down, or just how did
54 you observe him? A. Well, to tell the truth, I didn't have time to observe anything much.

Q. So that you had only taken a step or two behind the truck when you first saw the blow in your back? A. That is right, sir.

Q. And was it simultaneous, or almost together, that the blow came and the yelling you heard to look out? A. Yes, it was. The truck hit me about the time the men yelled. I didn't have time to turn each way.

Q. You were familiar with the trucks when you worked on jobs of this kind--about the size, and types? A. Yes.

Q. And they are pretty big machines? A. They are pretty big size.

Q. And they make a good deal of noise from your experience? A. Well, the mixing of the chains and everything makes quite a bit of noise.

Q. And as you came along, I believe you told us, as you were coming toward the truck, that as you came up toward the truck you could see the driver? A. The driver was sitting in the seat.

Q. And then you marked here on the board a little place--you see where you put it--well, you said when you got here then you
55 couldn't see the driver any longer? A. That is right.

Q. You still hadn't reached the extreme front of the truck had you? A. No, sir, I had about reached the bumper of the truck.

Q. At that time did you observe the driver any more--but you just knew the man was in there? A. No, sir, I didn't observe him any more.

Q. Did you see whether he was looking out to his left toward the back of the truck? A. No, sir, all I knew was that he was sitting in the cab but I didn't observe which way he was looking because there was a glare in the windshiel.

Q. So no matter what he was doing, you might not be able to determine with the glare? A. That is right.

Q. Do you remember what kind of day it was? A. It was rather cloudy day--not too cloudy, but the sun was filtered through the clouds.

Q. Were there any trees along that street? A. It was partially shady.

Q. Is there quite a canopy of trees over the area where you were looking? A. On the north side there was.

Q. When you got to the front of the truck then you just continued on? A. I continued on, yes, sir.

56 Q. You knew, didn't you, when you got to the rear of the truck and saw that truck there and you saw the man with the chute out there that he was going to put that concrete into that cut. You knew that, didn't you? A. Well, I knew it when I got there, but I didn't have time to make up my mind.

Q. I say when you got to the back of the truck you could see that was the situation and you could also see that the chute didn't reach

the cut? A. Yes, but I was supposed to tell them not to put any cement there, but go with me down to the next cut.

Q. You were supposed to tell them that? A. Yes, sir.

Q. You told who that? A. Tell the driver.

Q. Where was he? A. The man in charge--he was down in front of my compressor and wanted this truck to move up to our place. I had just finished it up and the next truck was to come in to that hole.

Q. Had he sent you up there? A. Yes, he sent me but I went over to see this man that wasn't there and he told me to tell them to send the truck down there and to see the man who was just up there.

57 Q. In other words, he told you to tell them not to work up there but to come on down where he was? A. That is right and to tell them not to come in there but I didn't get a chance to see any . . .

Q. You didn't see the driver when you went by the front of the truck? A. I wasn't supposed to see the driver.

Q. Who did he tell you to tell? Wouldn't you suppose the driver had something to do with it--where the concrete was going? A. I didn't assume that.

Q. You went to tell the men where they were to go to empty the concrete? A. That is right.

* * * *

58 Q. Where you made your right turn behind the truck you couldn't then see the driver, could you? A. No, sir.

Q. From his position in the truck, would the driver have been

59 able to see you if he had looked--from his position in the truck. Do you know? If you don't, you don't. A. He could have observed through his right hand rear view mirror and seen me.

MR. WELCH: I object to that as a conclusion, if the Court please. There was no showing there was a right hand mirror on the truck.

THE COURT: All right.

Q. After the accident--you wouldn't--do you know what happened with anybody there, would you? A. No, sir.

Q. Have you ever talked with the driver since then? A. Yes, he came down to see me in the hospital, but we never did say much.

Q. You didn't talk about the accident? A. No, sir, he just came to say he was sorry.

Q. Have you ever talked with Jackson or Thomas, the men you saw behind the truck? A. No, sir, I have never seen them since. I wouldn't know them if I did see them.

Q. Do you recall talking with the man that you were going to see, that you wanted to see back there? A. No, sir.

Q. Do you know whether that man saw the accident or not? A. I do not think so because I didn't see him when I went up there.

60 Q. You wouldn't remember anything like that? A. No, I was just anxious about my leg, that is all.

Q. Then you went to see Dr. John Allan Talbot? A. Yes, sir, I went down and he had some x-rays made.

Q. Didn't he examine you, too? A. He examined my leg.

Q. Did you tell Dr. Talbot how your accident happened? A. No, sir, I don't think I did.

Q. You say you do not think you did? A. He just asked me what happened to it. I was requested to go down for an x-ray.

Q. You mean Dr. Talbot asked you to go and have an x-ray taken? A. I was requested to go down there.

Q. But when you got there didn't he ask you to have an x-ray taken again? A. That is right.

Q. When you were at Dr. Talbot's did you tell him while you were filling the place you had another accident? A. Yes, sir.

Q. Did you tell him that you stumped your toe over a curb? A. No, sir.

Q. Is that what happened? A. No, sir.

61 Q. Are you sure you didn't tell Dr. Talbot that? A. I am positive I didn't tell him that, sir.

Q. Did you see Dr. Talbot's report? A. No, sir.

Q. Or do you remember what he told you about your leg?

A. No, sir.

Q. Did he tell you that you wouldn't need any further medical treatment? A. No, sir.

Q. He didn't tell you that? A. No, sir, he didn't discuss it with me at all--I mean my condition.

* * * *

63 Q. On the day of this happening you said you had come about 4 feet behind the end of the truck when you turned to the right. A. Possibly 2, 3, or 4 feet. I don't know exactly.

Q. You were walking along just as you showed us here at a medium pace, weren't you? A. Yes, sir.

Q. Isn't it a fact that as you walked along the side of that truck, the truck was moving backward? A. No, sir.

Q. Are you sure? A. I am positive of that.

Q. Isn't it a fact that when you stepped to your right and made that right turn that you knew the truck was backing to get to that cut and

64 the man was there holding the chute and you wanted to get by before he backed up that far? A. He was holding the chute when I walked toward the back of the truck, but the truck wasn't moving itself.

Q. How many feet do you think you would go in a second if you went along at your walking pace? A. I couldn't say how many feet I can go in a second.

Q. You had only taken one or two steps beyond the truck when you cut in behind it. A. I didn't cut in behind it; I veered off from it.

Q. You veered from where you were walking so that it put you behind the truck. If the truck was standing still when you had come a step or two or three behind it and you veered towards the right and got behind it and it had not begun to move from standing still, wouldn't you have been 4 or 5 steps beyond there before it reached that point? A. I do not know. It probably started just as I got to the rear of the truck. I know it was standing still when I walked up and it was still standing still making a tremendous lot of noise, but all I know is the man yelled and I turned and that is when it happened.

Q. And you weren't going to walk down to that cut were you? A. No, sir.

65 Q. So in the distance of from 4 to 5 to 6 feet behind the man with the chute you had to go the width of the truck didn't you? A. I didn't know what he was going to do at that time. I had just walked out behind the man.

Q. And you weren't paying any attention to whether the truck was moving or not? A. I was.

Q. Did you see it about to move? A. I couldn't as my back was to it, but it wasn't when I passed it.

Q. You couldn't look and see it without turning? A. Not without turning.

Q. And you didn't turn, did you? A. I didn't turn until the man yelled.

Q. So you weren't paying any attention to whether the truck had started to move or not when you cut in to your right? A. No, sir, because it was still in my sight; I could still see it at that time when I veered off and it hadn't moved.

Q. How many steps had you gone beyond the truck before you made your right veer to bring you behind it? A. Possibly two steps. I just veered slightly to the left sort of on an angle.

Q. You veered to the right. A. I said on an angle. Yes, to my right.

66 Q. And at that time you could see the man where the "x" is up here in the corner by the cut, and you could also see the man with the chute. A. I could see a man--it happened so quickly and the truck struck me in the back and that threw me off balance.

Q. So you didn't have any time to observe whether the truck started to move after you got behind it, did you? A. Not behind it, no actually I didn't.

Q. And it is your testimony that it was standing still when you got to the end of the truck and made your right turn? A. And veered off to the right.

Q. After you got out of the cab of the truck that you drove when the second incident occurred and you strained your leg, were you hospitalized on that occasion? A. No, sir.

* * * *

68 REDIRECT EXAMINATION

BY MR. GREGG:

71 Q. Under cross-examination you were asked by Mr. Welch whether or not you were familiar with cement mixer trucks and your answer was yes. A. I don't drive, sir.

Q. You don't drive it? A. No.

Q. You are acquainted and familiar with what they look like though? A. Oh, yes, we have them quite a bit in this job.

Q. This particular truck had two sets of dual wheels in the rear? A. Yes, sir.

Q. Do you know which set of the dual wheels it was caught your heel? A. The rear one.

Q. The one close to the rear of the truck? A. Yes, sir.

72 Q. Are you familiar with the other equipment on a cement mixer truck? A. No.

Q. Do you recall whether this particular truck had a rear view mirror or not? A. Well, truthfully I can't--

MR. WELCH: Just a minute. I object to that as a leading question.

THE COURT: I will let him lead that much.

MR. WELCH: There was no direct testimony, or cross testimony, about that if the court please.

THE COURT: Well, I will let the witness answer the question.

BY MR. GREGG:

Q. The question is to the best of your recollection do you recall whether there was a right hand rear view mirror on this particular truck--yes or no. A. Well--

THE COURT: Well, answer if you know.

A. Yes, there was a rear view mirror on the truck.

Q. Where was that mirror located? A. It was located on the right side of the forward part of the door.

THE COURT: I thought you said on direct you didn't know that. Was I in error in regard to that?

73 MR. WELCH: Your Honor, I don't think he testified to seeing it on direct.

No, sir, but he brought up something about if the driver had looked in the mirror he could have seen and I made the objection to that.

THE COURT: But the witness didn't make any statement to that effect.

MR. GREGG: No, sir.

THE COURT: All right.

BY MR. GREGG:

Q. Where was this mirror located? A. It is located on the windshield post of the door.

Q. On what side of the truck? A. On the right side--the one in question.

* * * *

75 MR. GREGG: I have no further questions, if the Court please.

RECROSS EXAMINATION

BY MR. WELCH:

Q. How many of these Maloney trucks have you seen? A. Well, I have seen quite a few of them on the streets and on the job.

Q. You see them go by on the street and you don't examine the trucks yourself? You don't know whether they have two mirrors,

76 three sets of wheels, two sets of wheels, or . . . ? A. No, sir.

Q. You know they are big trucks, but you didn't notice

A. But this one did have.

Q. When did you notice this one? A. When I went by it.

Q. You noticed what? A. The rear view mirror on the side of it.

Q. Are you sure of it? A. It was a long one.

Q. By long do you mean it was shaped like the A. More or less, but narrower.

Q. In other words, one side was shorter than the other side? A. No, it was about that long and it was square on each end the same as on the side.

Q. How big was it? A. Well, it was possibly 18 inches long and about 4 inches wide--4 to 6 inches wide taking in the frame and all.

Q. So it isn't square? A. It wasn't completely square--it was oblong. It was a long square.

Q. It can't be square and not square. A. It had square corners on it.

77 Q. You mean it had square corners like the table? A. That is right.

Q. That wasn't what you meant when you said it was square, was it? A. All I can say it was a long square--it isn't oval.

THE COURT: Did you actually see? You hesitated when the question was asked. I would like to know whether you actually observed that mirror or whether you are . . .

A. I actually seen the mirror.

THE COURT: All right. How long an arm was it on?

THE WITNESS: Possibly 18 inches at an angle like this.

THE COURT: How much smaller was the width of the cab than the width of the truck?

THE WITNESS: Well, I don't know exactly how much smaller; it was some smaller.

BY MR. WELCH:

Q. Well, how much. If you saw the mirror you should have seen the cab in the back of the truck? A. In other words, the drum

and the cab are approximately the same width. Maybe the drum is a little wider; that is the reason for that mirror standing out there.

Q. Can you estimate how much wider? A. It was possibly 8 or 10 inches on each side.

Q. You referred in your previous statement to a cat walk.

78 What is a cat walk? A. It is a little piece of metal, a steel walk way, that he walks along from one end of the truck to the other.

Q. And that is on the outside of the truck, isn't it? A. It is right over the wheels.

Q. Can you tell us how wide a truck this was? A. No. I would say it would be 8 feet wide over all.

Q. Did the body extend out over the wheels? A. The cat walk is about even with the wheels.

Q. There were double wheels, weren't there? A. Yes, sir.

Q. That is under the body of the truck? A. Dual wheels.

Q. And there were two sets of dual wheels? A. That is right.

Q. So that on each side there would be four wheels? A. That is right.

Q. Would the body extend out over those wheels at all? A. To the rear of one another.

Q. Not to the side? A. No, not the outside tires, I do not think it extends any. I am not positive, I never noticed it that closely.

Q. And how wide a space did these dual wheels take up?

A. I would say they would take up at least 2 feet, maybe.

Q. And there were dual on both sides, so that would be four feet of wheels sideways? A. That is right.

79 Q. And then you only had a cat walk of four feet for this truck?

A. It is oval down in there.

Q. And its diameter is more than four feet? A. Yes.

Q. How much is the diameter of the drum? A. I don't know, I never measured it.

Q. And the truck body where the concrete is in the truck stored, the drum of the back end is wider than the drum, isn't it? A. You

mean the opening?

Q. I do not mean the opening but where they store the stuff that goes into the drum that is spun, there is a part of the truck that is wider than the drum? A. Only the cat walk.

Q. Doesn't the cat walk attach to something other than the drum? A. The outside frame.

Q. And isn't that outside frame wider than the drum? A. Yes, it has to be.

Q. So the overall truck is approximately eight feet wide? A. Yes.

Q. Does that rear view mirror extend out beyond that cat walk?

80 A. It has to.

Q. Did you observe how the driver was seated in his driver's seat, how far in feet that mirror was on the right? A. No, I didn't observe that.

Q. Do you know whether when you stepped behind the truck, and got behind it, that the mirror will show something that is directly behind it or not? A. Yes, sir, it would.

Q. It would? A. Yes, sir.

Q. You do not know the angle at which it was adjusted, do you? A. No, I do not know that but if it was adjusted properly it would.

Q. And you are--if you have a mirror on the arm and somebody steps behind the vehicle he may adjust to it that you couldn't see? A. I didn't say he could.

Q. You say that but you do not know whether he could? A. I do not know if he could, if it was adjusted properly and he looked, he could have seen me.

MR. WELCH: Your Honor, I move that the last part of his statement be stricken as not being responsive.

THE COURT: I will let it stand for what it is worth.

MR. WELCH: I have no further questions, Your Honor.

81 THE COURT: All right.

MR. GREGG: Call Doctor

THE COURT: Have you got a doctor?

MR. GREGG: Yes, sir.

THE COURT: All right, the jury may retire to the jury room.

As I understood when you started out on the case you simply were going to use Dowell to introduce to the jury and some medical testimony?

MR. GREGG: The medical doctors.

THE COURT: Dowell, isn't it?

MR. GREGG: Yes, Your Honor.

THE COURT: Do you have any further evidence on the main issues, that is, the liability issues of how the accident occurred?

MR. GREGG: No, Your Honor.

THE COURT: Your opponent made a motion for a directed verdict on the opening statement, and I overruled that to see what the case would develop. I am now going to permit him, to take up his motion for a directed verdict and assume the medical testimony is already in, and if I over rule it, receive the medical testimony. If I sustain it, it won't make any difference to have the medical testimony in, but will save time to hear the case on the liability, as to whether there is a question for the jury here.

* * * *

84 MR. GREGG: I am sure His Honor realizes--

THE COURT: I will tell you what I realize and what I believe and then you must adhere to the facts. In order to justify a directed verdict the evidence must be assumed in the light most favorable to the plaintiff. I am always very reluctant to render a directed verdict. Where I did that--further for your information because you do not know me along that line but I can remember very few directed verdicts if set aside and would vote if the evidence had been let go to the jury, on the facts. I direct a verdict if I am going to take the case out of their hands, but I don't if I feel there is any chance of injustness and I prefer the arguments of the facts with the knowledge that the Judge understands that law, whether people for the plaintiff, I don't venture judgment

for he is a trial judge as well as an appellate judge but here you have a case that, on trial, that I want to give you an opportunity for argument.

* * * *

89 THE COURT: It was at a point that I don't see if he saw it, that the driver by the exercise of reasonable care, could have seen this man in time because of the circumstances given to the jury. That is what I don't believe true because this man turned so suddenly. He got hit because, from his own testimony as to whether or not there was reasonable exercise given on the part of the dirver of the truck, he wasn't back there long enough to warn this man but he did by the movement so quickly to the rear of the car that regardless of a blind spot, if there might have been one, I am not assuming there was, I am assuming the driver was looking right straight into the mirror, but the movement was so quick that this man did not see in the course of the quickness of his turn.

MR. GREGG: You say he was negligent by the quickness of these--

THE COURT: By the quickness of his own turn.

MR. GREGG: Your Honor his testimony he was at least two or three steps and he was angling off on an angle.

THE COURT: I thought he made a quick turn beyond from what he saw him do, walk up in front and anyway he was at least, he was

90 going at a slow progress.

MR. GREGG: He couldn't make the type of turn he did because of the fact he had walked two or three steps and furthermore, his drawing on the board indicated he was, his turn was on an angle; that he was just about half, half of the body was behind the truck. He was struck in the middle of the back by the extreme rear corner of the truck. In any event at that time he had not, he is not at the time of the impact, because half of the body should have been seen by the driver of the truck and had he looked he should have seen and he should have looked.

THE COURT: I will have to grant a directed verdict because I do not think you have made a case for the jury.

Bring the jury in.

THE COURT: Ladies and gentlemen of the jury after the opening statement of the plaintiff's attorney had been made, the defendant's attorney moved the court to direct the jury to return a verdict for the defendant for the reason that no liability, as a matter of law, appeared in the opening statement of the attorney for the plaintiff. I overruled that motion because I desired to hear the proof in the case from the plaintiff to see just what proof would be entered.

The plaintiff took the stand in his own behalf and the officer made the diagrams out there and that was all the proof that you heard in the case, except there would have been medical testimony if the case
91 were to go to you for a verdict. As to the amount of damages, by viewing the evidence that was entered in the light most favorable to the plaintiff, and making the most favorable inferences that I can rationally do from the testimony, I still find it my duty to take this case from the plaintiff and decide it in favor of the defendant. For those reasons, if we assume here that there has been any negligence shown on the part of the defendant, undoubtedly it has in your mind been shown as the proximate cause, contributory negligence on the part of the plaintiff himself which brought about the injury. He showed you by demonstration in front of the jury box the movement pace at which he was walking. He was walking in the neighborhood and the suddenness of his turn, he took two or three steps after he had reached the rear end of the truck and was there without any knowledge on the part of the driver, as has been shown here. No lack of care has been shown on the part of the driver of the truck in backing the truck, as he was there to dump this stuff into the excavation there, that was his purpose of directing the truck which he was carrying out, so I am unable to see any liability in this case. Reluctantly as I am to give a direct verdict for the defendant, I say reluctantly because I do not like to take a case from the jury, but this judgment could not be upheld justly and fairly

in accordance with the law. If you would be willing to bring in a ver-

92 dict for the plaintiff and which I am taking the responsibility of deciding the case in favor of the defendant because delivering all the evidence that he has in the light most favorable to the plaintiff, all he can effect is that he brought about the injury, unfortunately, through his own negligence, which caused the accident. So under the circumstances it must be taken out of the hands of the jury and I have no alternative other than to direct this verdict.

(The Court adjourned at 4:20 P.M.)

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109 [Filed April 28, 1958]

VERDICT AND JUDGMENT

This cause having come on for hearing on the 28th day of April, 1958, before the Court and a jury of good and lawful persons of this district, to wit:

Roberta F. Ambrister	Fred Henry, Jr.
Ulysses Marshall	Harold L. Biddiex
Marie A. Demuth	Charles E. Eslin
Robert D. Pitcher	William F. McKay, Sr.
Katherine H. Felker	Bernita G. Owens
Woodrow W. Branner	William H. Bell

who, after having been duly sworn to well and truly try the issues between Royal Indemnity Company and Fred A. Dowell, plaintiffs and Maloney Concrete Company, defendant, and after this cause is heard and given to the jury in charge, they upon their oath say this 28th day of April, 1958, that they find for the defendant against said plaintiffs, by direction of the Court.

WHEREFORE, it is adjudged that said plaintiffs take nothing by this action, that said defendant go hence without day, be for nothing held and recover of plaintiffs his costs of defense.

By direction of Judge John D. Martin, Sr.

Harry M. Hull, Clerk,
By /s/ Wm. R. Harper
Deputy Clerk

110 [Filed May 8, 1958]

MOTION FOR NEW TRIAL

Plaintiffs move the Court to set aside the verdict of the jury returned herein on April 28, 1958, and the judgment entered thereon, and to grant a new trial on the following ground:

1. The Court erred in directing a verdict for the defendant in that:

(a) The granting of the motion was contrary to the law.

(b) The granting of the motion was contrary to the evidence.

(c) And for such other and further reasons to be given at the hearing hereof.

MACLEAY, LYNCH & MACDONALD

By /s/ James C. Gregg

Attorneys for Plaintiffs

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(Certificate of Service)

* * *

111 [Filed May 8, 1958]

POINTS AND AUTHORITIES

Rule 59 of the Federal Rules of Civil Procedure provides in effect that this Court has the power, in the exercise of its discretion, to grant a new trial to a party aggrieved by a ruling made at the trial either upon motion duly filed or by initiative of the Court.

Rule 50, FRCP, providing for motions for directed verdicts, is the rule under which the Court disposed of this action, granting defendant's motion made at the close of the opening statement and remade at the close of plaintiffs' evidence on the issue of negligence.

Sub-section (b) of Rule 50 provides that if a motion for directed verdict is denied or not granted, the Court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion.

The granting of such a motion, therefore, involves a determination of a matter of law, not of fact. As indicated by the Court in passing on the motion, the evidence must be construed most favorably to the plaintiff

and he is entitled to the full effect of every legitimate inference therefrom, and if, on the evidence so considered, reasonable men might differ, the case should go to the jury. Shewmaker vs. Capital Transit Company, 79 U. S. App. D. C. 102, 143 F 2nd 142, Higashi vs. Shifflett,
112 90 U. S. App. D. C. 302, 195 F2nd 784, Willoughby vs. Safeway Stores, Inc., 91 U. S. App. D. C. 168, 198 F 2nd 604, Goodwin vs. Hertzberg, 91 U. S. App. D. C. 385, 201 F 2nd 204.

The question thus presented at the stage of the proceeding when the motion was granted was whether, as a matter of law, not fact, the evidence was sufficient to permit the case to go to the jury. A motion that presents a question of fact, i.e.: the matter of preponderance of the evidence is a jury question, and not a law question, so that it cannot properly be made the subject of a motion for a directed verdict, Duncan vs. Montgomery Ward & Company, 108 F 2nd 848, 311 U. S. 243, 61 S. Ct. 189, L. Ed. 147.

Issues of negligence or contributory negligence are universally recognized as being issues of fact and it is only when reasonable men could not honestly draw different conclusions as to the existence or non-existence of the negligence charged that the question becomes one of "law", Tobin vs. Pennsylvania Railroad Company, 69 App. D. C. 262, 100 F 2nd 435, cert. denied 59 S. Ct. 488, 306 U. S. 640, 83 L. Ed. 1040, Boaze vs. Windridge and Handy, 70 App. D. C. 24, 102 F 2d 628, McWilliams vs. Shepard, 75 U. S. App. D. C. 334, 127 F 2nd 18.

In the instant case, the clear and uncontradicted evidence and testimony was as follows: The individual plaintiff approached the defendant's truck from the front from a distance of approximately 60 yards; The truck was standing still with the cement mixer drum turning and the driver was sitting in the driver's seat looking forward; He walked along the right side of the truck about three feet from the body at a normal pace, noting a rear-view mirror on the right-hand side of the truck giving the driver a view to the right side rear of the truck; The truck remained standing as he passed the extreme right-rear corner,

113 and he noted a man holding the unloading chute, who was standing also; He made at least 2 steps beyond the right-rear corner and angled toward his right when he simultaneously heard a warning and was struck on the right-upper part of his back by the right-rear corner of the truck; The blow propelled him on a 45 degree angle to his left and the right truck wheel lug caught his heel, fracturing both bones in his right leg.

It is therefore submitted that the foregoing facts being true, the plaintiff was further entitled to the following inferences:

1. The area where the accident occurred being partially under construction, it was known to the defendant's driver that other workmen were likely to be in or near the vicinity.
2. That defendant's driver saw the plaintiff approach from the front on a path directed to place him in the proximity of the truck.
3. That defendant's driver either saw, or should have seen plaintiff walking along the right side of the truck toward the rear.
4. That defendant's driver either saw plaintiff angle toward the rear of the truck placing himself partially behind the truck, or he should have, in the exercise of due care seen him, or that, in any event, the defendant's driver should have anticipated such a turn by the plaintiff.
5. That plaintiff, having seen the truck standing for the period of time it was under his observation, could in the exercise of due care anticipate it would continue to remain stationary.

114 6. That the noise of the turning drum was sufficient to prevent plaintiff from hearing the truck approach him from the rear and, on the other hand, that defendant's driver knew that such noise would prevent the plaintiff from so hearing.

7. That the instrumentality that caused the injury was under the exclusive control of the defendant, and if not carefully operated, it was likely to do harm.
8. That the striking of a pedestrian by a backing truck is, in itself, negligence, especially in the absence of an explanation

by defendant's driver.

9. That even conceding arguendo that plaintiff was contributorily negligent in stepping partially behind a standing truck, the last negligent act that occurred in point of time was the starting of the truck without making certain that it could be done with safety and was thus the efficient and proximate cause of the plaintiff's injuries.

It is therefore respectfully submitted that the facts, fairly presented, constituted a jury question, and although the plaintiff may not necessarily have eventually prevailed, nevertheless, his case merited the jury's consideration. See Stofer vs. Montgomery Ward & Company, 249 F 2nd 286 wherein it was held that "ordinarily it is inadvisable for a trial judge to direct a verdict at the close of the plaintiff's evidence. The temptation to do so in a case which the judge believes to be without substantial merit is often hard to resist but the additional time required to put the case in such shape that it will not, in any event, have to be retried is usually time well spent".

MACLEAY, LYNCH & MACDONALD

By /s/ James C. Gregg
Attorneys for Plaintiffs

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115 (Certificate of Service)

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116 [Filed May 14, 1958]

OBJECTIONS TO MOTION FOR NEW TRIAL

Comes now the defendant Maloney Concrete Company, and for objections to the motion for new trial filed herein, states as follows:

The motion for new trial states that the Court erred in directing a verdict for the defendant, in that:

(a). The granting of the motion was contrary to law;

(b). The granting of the motion was contrary to the evidence;

(c). And for other and further reasons to be given at the hearing.

It cannot be seriously contended that the granting of the motion in this case was contrary to law or to evidence and, indeed, the second paragraph of points and authorities submitted in support of the motion clearly indicates that under Rule 50, Federal Rules of Civil Procedure, provision is made for motions for directed verdict.

Sub-section (b) of Rule 50, of course, provides that if a motion for directed verdict is denied or not granted, the Court is deemed to have submitted the action to a jury subject to a later determination of the legal questions raised by the motion. We have no quarrel with the provisions of the rules which are set up for the proper disposition of cases and clearly if the Court did not have the power to grant motions for directed verdict, there would be no occasion for the inclusion of Rule 50 in the Federal Rules.

117 We do not follow the reasoning of counsel for the plaintiff that sub-section (b), Rule 50, provides that where such a motion is granted, the matter is one of fact and not of law.

There is no need, as we view the situation, of discussing the Rule that in considering a motion for directed verdict, the evidence must be construed most favorably to the plaintiff and that he is entitled to the full effect of all legitimate inferences therefrom and if on the evidence so considered, reasonable men might differ, then the matter is a subject for the jury.

There is no quarrel with this theory of the Law, nor the cases which have so held. It is not the rule of law that is in question, but it is the proper application thereof and the time in the proceedings of the presenting of the motion has nothing whatever to do with determining that the question presented is one of fact or of law.

The motion presented here was simply and succinctly that if all of the matters stated in the opening statement were to be proved, a case would not be made out against the defendant. The Court overruled the motion and permitted an amendment of the opening statement and again overruled the motion at the conclusion of the opening statement as amended.

When all of the testimony on negligence was concluded, it is to be remembered that the case was about to proceed and the plaintiff's attorney had called the name of his doctor who was in the waiting room and the Marshal had gone to get the doctor to testify as a witness in behalf of the plaintiff, when the Court interrupted and requested information as to whether or not all of the testimony on the question of liability had been concluded. Upon being informed that it was, the Court of its own volition at that time because of the paucity of evidence on the question of negligence, indicated that it would consider the renewal or a presentation of the motion for directed verdict at that time rather than to await the time involved in presenting medical testimony.

118 The motion was made and argued and the Court very carefully pointed out that giving the plaintiff the benefit of all inferences, he was entitled to, that reasonable men could not differ on the outcome of the proposition and, therefore, directed a verdict in accordance with time honored custom, authority and power in the courts to do just this type of thing.

It is, we respectfully submit, unnecessary to review the evidence in detail, but suffice it to say that the items set forth on page 3 and 4 of plaintiff's memorandum of points and authorities are not well taken; for instance:

(1). The fact that this was a construction job and that other workers were apt to be in the area was, from the evidence, not only known to all present, but obviously was being taken into consideration by the defendant and its driver, in that, its truck was being carefully backed under the direction of the general contractor's employees, one of whom was directing him how and where to move the truck and the other was holding the chute from the truck in order to place it in proper position for the dumping of the contents of the truck.

(2). There is no basis for the assumption that the defendant's driver saw the plaintiff approach from the front on a path directed to place him in the proximity of the truck. This is an unwarranted conclusion of plaintiff's and there was no testimony from which anyone could

assume or conclude that the driver of the truck saw the plaintiff as he came from one place on the job to another; in fact, the contrary is true because the driver was obviously watching for backing signals and did not move his truck until he was signalled and the signalling party was in back of the truck and the driver watching a man in back of the truck for signals, could not see someone approaching from the front.

119 (3). There is no duty on defendant's driver to have seen someone approaching from the front or walking along the right side of the truck on a job of this kind under the circumstances under which he was working.

The other items referred to by plaintiffs are attempts to make this case one for application of the Doctrine of Last Clear Chance and obviously they fail, because in order for the Doctrine to be applied in this jurisdiction, there would have to be testimony in an assumption that the driver of the truck saw the plaintiff, saw him in a position of danger, and being aware of his danger, failed to take it into consideration in his actions. There is no such testimony in this case.

There is no basis for the statement that the plaintiff having seen the truck in a standing position for a "period of time " could anticipate it would continue to remain stationary. Just the contrary is true. It was there to unload; it had to move into position to unload and actually he testified he knew it was there for that purpose and he had been instructed to go to the point where the truck was and advise them not to unload it there, but to take that load to another place for unloading and he deliberately walked beyond the driver without saying a word to the driver concerning the request that it not be unloaded there and went looking for someone else (who he did not explain) to deliver a message which ordinary people would know must be delivered to the driver, so that they would not start unloading proceedings.

We could proceed with each one of the matters submitted, but will be glad to do so at the time of the hearing of this motion rather than in this memorandum.

There are undoubtedly cases, such as, Stofer vs. Montgomery Ward & Company, wherein it has been held that it may be inadvisable

for a trial judge to direct a verdict at the close of plaintiff's evidence, but that case and every other case in which such a holding is made must stand on its own evidence and on the basis of the facts therein. Here there was no evidence of negligence and if there was, as was well

120 pointed out by the Court, there was without question contributory negligence on the part of the plaintiff; hence, the motion had to be granted by the Court in the exercise of judicial discretion and his consideration of the problem presented.

It is respectfully submitted that there is no basis for a new trial in this case.

WELCH, DAILY & WELCH

By: /s/ J. Harry Welch
Attorneys for defendant

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(Certificate of mailing)

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121 [Filed May 22, 1958]

ORDER

The Motion for New Trial, with accompanying Points and Authorities, and Objections to Motion for New Trial have all been considered; and

The motion being found without merit is, accordingly, denied.

ENTER:

/s/ John D. Martin
United States Circuit Judge
Sitting by Designation.

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122 [Filed June 18, 1958]

NOTICE OF APPEAL

Notice is hereby given this 18th day of June, 1958, that Royal Indemnity Company and Fred A. Dowell appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 22nd day of May 1958 in favor of Maloney Concrete

Company against Royal Indemnity Company and Fred A. Dowell.

/s/ James C. Gregg

/s/ Charles E. Channing, Jr.

/s/ Hugh Lynch, Jr.

Attorneys for Royal Indemnity Company and Fred A. Dowell

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124 [Filed June 26, 1958]

STATEMENT OF POINTS

The points upon which appellant intends to rely on this appeal are as follows:

1. The Court erred in concluding at the close of the plaintiffs' testimony that plaintiff, Fred A. Dowell, was guilty of contributory negligence as a matter of law and that such contributory negligence was the sole proximate cause of his injuries.
2. The Court erred in directing a verdict for the defendant at the close of the plaintiffs' case on the issue of liability in that:
   (a) The granting of a Motion for a Directed Verdict at that stage was contrary to the evidence.
   (b) The granting of a Motion for a Directed Verdict at that stage was contrary to the law.
3. The Court erred in denying plaintiff's Motion for New Trial.

MACLEAY, LYNCH & MACDONALD

By /s/ Hugh Lynch, Jr.

/s/ C. E. Channing, Jr.

/s/ James C. Gregg

Attorneys for Appellants

* * * *

125 (Certificate of Service)

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126 [Filed June 26, 1958]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Pursuant to Rule 75(a) of the Rules of Civil Procedure, the plaintiffs-appellants hereby designate the following portions of the record, proceedings, and evidence to be contained in the record on their appeal from the final judgment herein:

1. Complaint.
2. Defendant's Answer to Complaint.
3. Plaintiff's Amended Complaint.
4. Plaintiffs' Pre-Trial Statement.
5. Defendant's Pre-Trial Statement.
6. Pre-Trial Order dated January 30, 1958.
7. Verdict entered April 28, 1958.
8. Reporter's transcript of the evidence and testimony.
9. Photographs of blackboard drawing of scene of accident.
10. Plaintiffs' Motion for New Trial and accompanying Points and Authorities.
11. Defendant's Objections to Motion for New Trial.
12. Order denying Motion for New Trial dated May 22, 1958.
13. Notice of Appeal filed June 18, 1958.
14. Statement of Points on which appellant intends to rely, served herewith.
15. This Designation.

MACLEAY, LYNCH & MACDONALD
By /s/ Hugh Lynch, Jr.
/s/ C. E. Channing, Jr.
/s/ James C. Gregg
Attorneys for Appellants

* * *

127 (Certificate of Service)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,667

168

ROYAL INDEMNITY CO.,
To Its Own Use And To The Use Of
FRED A. DOWELL,
Appellant,

v.

MALONEY CONCRETE COMPANY,
Appellee.

Appeal From The United States District Court
For The District of Columbia

United States Court of Appeals
For the
District of Columbia Circuit
FILED DEC 30 1958
Joseph W. Stewart
CLERK

J. HARRY WELCH
H. MASON WELCH
J. JOSEPH BARSE
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Attorneys for Appellee

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

QUESTION PRESENTED

Whether the lower court was correct in directing a verdict for the Appellee when the Appellant's evidence revealed that he veered sharply behind a truck engaged in construction work and the truck started to back just as he veered in behind it, and Appellant knew that the truck would have to back to perform its function.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,667

ROYAL INDEMNITY CO.,
To Its Own Use And To The Use Of
FRED A. DOWELL,
Appellant,

v.

MALONEY CONCRETE COMPANY,
Appellee.

Appeal From The United States District Court
For The District of Columbia

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

This is an appeal from a verdict directed by the Court below in favor of the Appellee. At the trial the Appellant's evidence revealed that he was working on a street surfacing job and had been sent to give some directions to some person standing about 50 or 60 yards away to the left rear of a cement mixer truck. The Appellant testified that he was familiar with this type of truck and its general operation (AA 36). He walked straight toward the front of the truck for approximately 50 yards and did not know whether the driver could see him or not because the sun was glaring on the windshield (AA 37). He passed

down the right side of the truck and observed that the truck was about 12 feet from a cut in the street (AA 31) and that there was a man on the left rear of the truck holding the truck's chute but the end of it was still about six feet from the cut (AA 36). The Appellant testified he knew the truck was going to empty its load in the cut (AA 37). The truck had been standing still during the whole time of Appellant's approach, and the mixer drum was going, causing considerable noise. As the Appellant reached the rear of the truck he veered sharply on an angle behind the truck taking his eyes off it (AA 48). The Appellant had taken but a step or two when he was struck in the back by the truck (AA 36), almost at the same instant as a warning was shouted.

SUMMARY OF ARGUMENT

This accident occurred on a construction job and not in the public highway. The Appellant at the time of the accident was not engaged in any task which would require a division of his attention, he was rather in the same situation as an ordinary pedestrian and able to, and required to, devote full attention to his own safety. The truck driver, on the other hand, was engaged in a difficult task involved in the construction, and the Appellant knew that the driver's attention would of necessity be divided and he knew that the truck would have to back to reach the cut, nevertheless, the Appellant cut in sharply behind the truck at almost the same moment it was started and he was struck. On this state of facts the trial judge correctly directed a verdict for the Appellee.

ARGUMENT

The trial Judge applied the correct standard of law in directing this verdict.

The trial Judge correctly stated that on a motion for directed verdict he must give the Appellant the benefit of

every legitimate inference from the evidence which might sustain a jury finding for the Appellant. He stated that he was doing so and in fact his remarks before granting the verdict show that he leaned farther in the Appellant's favor than the rule of law requires.

This Court in the case of *Shewmaker vs. Capital Transit Co.* (1944), 79 App D.C. 102, 143 F 2d. 142, set forth the guide to be used in ruling upon motions for directed verdict.

> "The rule applicable in the District of Columbia on a motion for a directed verdict, in an action founded upon negligence, is that the evidence must be construed most favorably to the plaintiff; to this end, he is entitled to the full effect of every legitimate inference therefrom; if upon the evidence, so considered, reasonable men might differ, the case should go to the jury; if, on the other hand, no reasonable man could reach a verdict in favor of the plaintiff, the motion should be granted; a mere scintilla of evidence is not sufficient; the question is not whether there is any evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party upon whom the *onus* of proof is imposed; the burden being upon the plaintiff to establish the negligence and injury alleged, if the evidence fails adequately to support either element the motion should be granted." (Emphasis by the Court).

This rule was reiterated recently by this Court in *Murray vs Towers* (1956) 99 App. D.C. 293, 239 F. 2d. 914; see also *Metropolitan Life Ins. Co. vs. Adams* (D.C. Mun. App.) 37 A2d.345.

The proof offered by the Appellant below proved only that he himself was negligent.

Negligence is not separable from circumstances, and a basic circumstance in this case is that this accident did not occur in a public highway, but rather, in an area barricaded off and restricted to the workers. The fact

that persons working cannot give their complete attention to safety is a circumstance firmly embedded in the law. 5 A L R 2d. 757. The cases in this annotation deal primarily with taking the fact of divided attention into account when judging the existence or lack of contributory negligence on the part of a workman performing his services in the street. In the instant case this consideration does not apply to the Appellant because he was in at least as good a position as the ordinary pedestrian, but it is a circumstance of importance when considering the driver's actions, and the Appellant's apparent disregard of the conditions, despite his admitted knowledge of them. Putting these generalizations in the concrete, in the present case the Appellant testified that he knew how the trucks operated generally, he knew that this particular truck had to back up another six feet or so, he did not know whether the driver saw him or not, and in fact the only legitimate inference is that he did not because the sun was glinting on the windshield, and he cut in behind the truck as soon as he reached the rear of the truck. The only possible conclusion from the behavior of the Appellant is that he placed himself in a position of peril of which he was aware, knowing also that the driver's attention would naturally be divided.

The Appellant, in his brief, makes much of Appellant's own testimony that the driver could have seen Appellant if he had looked in his rear view mirror. The Court below directly met this contention (AA 48) when he stated that the Appellant turned in behind the truck so sharply that even had he looked before backing he could not have avoided striking the Appellant. The fact that Appellant veered in behind the truck precipitously is borne out in his oral testimony as well as by the demonstration. Appellant stated:

> Q. You knew, didn't you, when you got to the rear of the truck and saw that truck there and you saw the

man with the chute out that he was going to put that concrete into that cut. You knew that, didn't you?
A. Well, I knew it when I got there, but I didn't have time to make up my mind. (AA 37).
Q. Was he (man directing truck driver) standing with his hands up or down, or just how did you observe him?
A. Well, to tell the truth, *I didn't have time to observe anything much* (emphasis supplied).
Q. So that you had only taken a step or two behind the truck when you first saw (sic) the blow in your back?
A. That is right, sir. (AA 36).

From this testimony and the demonstration by the Appellant of his movements it is apparent that he darted from a place of safety behind a truck which he knew had to back up to do its job, and that the truck started up almost simultaneously with his movement. By his own testimony it all happened so quickly that he did not have time to observe much of anything because he was struck after taking only a step or two. [1]

Appellant relies heavily on the case of *Eades* v. *Capital Materials Company,* 73 App D.C. 361, 121 F 2d. 72 (1941). The circumstances of the Eades case are certainly different from those pertaining in the instant case. In the *Eades* case the injured person was engaged in a job which required that he have his back to the trucks, and because of the noise the workmen could not hear an approaching truck. Further, and most importantly, the workman in the *Eades* case did not dart behind the truck. In the instant case, the Appellant was aware of the truck, and that to fulfill its function it would have to back up, and he was aware that the driver was engaged in his task, and the Appellant would not normally be behind the truck. Nevertheless, the Appellant darted behind the truck and

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[1] For cases on the question of darting in the path of a vehicle see 113 ALR 528.

took one or two steps, a warning was shouted and he was struck. It is respectfully submitted that each and every case in negligence depends on its peculiar circumstances, and that under the circumstances outlined above the trial Judge was impelled to hold the Appellant contributorily negligent as a matter of law.

CONCLUSION

It is respectfully submitted that the trial judge who observed the testimony and demonstrations at trial was correct in determining that Appellant was contributorily negligent.

Respectfully submitted,

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